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CROWN CASES

RESERVED FOR CONSIDERATION,

AND

DECIDED BY THE JUDGES OF ENGLAND,

WITH

A SELECTION OF CASES RELATING TO INDICTABLE OFFENCES,

ARGUED AND DETERMINED IN THE

COURT OF QUEEN'S BENCH

AND

The Courts of Error.

BY

HENRY RICHARD DEARSLY,

OF THE MIDDLE TEMPLE, ESQ., BARRISTER-AT-LAW.

VOL. I.

FROM 13TH NOV., 1852, TO 26TH APRIL, 1856, INCLUSIVE.

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PREFACE.

IN presenting this Volume of Crown Cases to the Profession, I take the opportunity of offering my respectful acknowledgments to Lord CAMPBELL, Lord WENSLEYDALE, Mr. Justice COLERIDGE, and to the rest of the learned Judges, for the kindness and courtesy with which they have handed to me, from time to time, their written Judgments in Cases of great importance. I feel also grateful to Mr. *Greaves*, Q. C., Mr. *T. F. Ellis*, and to many others of my learned brethren for many valuable suggestions and communications, which have tended, in no small degree, to facilitate my labours ; and in a most especial manner I have to offer my thanks to my learned friend Mr. *Bell*, of the Midland Circuit, for the kind assistance he has afforded me.

My predecessor, the late Mr. *Pearce*, proposed, in the conducting of these Reports, to depart from the plan originally laid down by Mr. *Denison*, by adding

Cases *ejusdem generis*, argued and decided in Her Majesty's Superior Courts at Westminster. I have reason to know that this course, in the opinion of the learned Judges and of the Profession generally, is not considered desirable. I have determined, therefore, in future, to adhere to the original plan of Mr. *Denison*, and to confine these Reports to the Crown Cases Reserved.

The late Mr. *Pearce* reported down to *Riley's Case* inclusive. For the remainder of the Volume I am responsible.

HENRY RICHARD DEARSLY.

TEMPLE,
June 26, 1856.

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ERRATA ET ADDENDA.

~~Page~~

- 179, line 7, at end of *Reg. v. Reed*, add "see post, 257."
198, line 8, for "there" read "he."
287, line 18, for "~~Platt~~" read "*Platt*."
" line 32, for "*Tostack*" read "*Toshack*."
314, at end of *Reg. v. Overton*, add "See now 17 & 18 Vict. c. 83. s. 27."
315, marginal note, line 33, for "L." read "him."
394, at foot of page, add "See post, 515."

J. L. M
27/2/33

REPORTS OF CROWN CASES RESERVED.

&c. &c. &c.

REGINA v. ISAAC WHITEHOUSE AND
JAMES TENCH.

1852.

THE defendants were tried before Mr. Justice WIGHTMAN, at the *Staffordshire* Spring assizes, on the 9th *March*, A.D. 1852, on an indictment for a conspiracy, removed into the Queen's Bench by *certiorari*, and sent down for trial at *Stafford*, before that learned Judge, and which charged that *Isaac Whitehouse*, a publican, and *James Tench*, an attorney, had conspired together to cheat and defraud *Margaret Barbara Beard*, the prosecutrix, and one *William Francis Shaw* of the documents of title to certain leasehold property in *Birmingham*, and the rents and profits thereof; also to make the said *William Francis Shaw* drunk, and to induce him, while in a state of drunkenness, to sign a conveyance of the same property.

A new trial will be granted on an indictment for a misdemeanour or on the ground of *Surprise*, as in civil cases.

2. Where a new trial on an indictment removed into the Queen's Bench by *certiorari* at the instance of the defendant, is ordered on the ground of surprise,

the Court may, in its discretion, order the costs to await the event of the new trial,

1852. The indictment contained twelve counts ; and the jury found the defendants guilty on the fourth count.

WHITE-HOUSE'S
Case.

On the 20th *April*, *Easter term*, A. D. 1852, *Allen Serjt.*, and *McMahon* for the defendants (*a*), moved for a rule *nisi* in the Queen's Bench, before Lord CAMPBELL C. J., WIGHTMAN J., ERLE J., and CROMPTON J., for a new trial on the ground of Surprise, and that the verdict was against evidence.

The motion was grounded on affidavits, from which it appeared that the prosecutrix, *Margaret Barbara Beard*, having some supposititious claim to certain property in *Birmingham*, under the will of a Miss *Mickle*, deceased, was desirous of disposing of her interest in it, and that the defendant, *James Tench*, was employed as an attorney to draw up an agreement between her and other parties respecting the same. An agreement was entered into between *William Francis Shaw* and *Margaret Barbara Beard*, and a deed of conveyance of the equity of redemption executed ; and then a mortgage from *Shaw* to the defendant *Whitehouse* for the sum of 150*l.* was prepared ; a deed intervening between the mortgage and the conveyance of the equity of redemption. The agreement dated 28th *September*, A. D. 1850, between the prosecutrix, *Beard*, and *Shaw*, reciting the sale under mortgage deeds, was put in evidence at the trial on the part of the defendants, and it then became a material question whether that was a genuine document, and whether the signature of *Margaret Barbara Beard* was genuine or not. The prosecutrix swore that she knew nothing whatever of the sale, and that the signature was a forgery. *Shaw*, one of the parties whom the indictment charged the defendants with conspiring

(*a*) The defendants were present in Court when the motion was made.

to defraud, was absent during the trial, and the affidavits set forth the absence of so material a witness whom the defendants fully expected would have been called as a witness for the Crown, and who it appeared concurrently with *Beard* had signed the deed, as a ground of surprise. The defendant *Tench* made an affidavit that the prosecutrix did execute the document reciting the sale; and *Shaw* and others made similar affidavits,

1852.

WHITE-
HOUSE'S
Case.

The Court granted a rule *nisi* for the new trial (*a*) on the ground of Surprise; against which *Hoggins* shewed cause in *Trinity* term, A. D. 1852, when the rule was made absolute; the Court ordering that the costs (*b*) should await the event of the trial.

(*a*) The new trial was had at the ensuing Summer Assizes for the county of *Stafford*, when the defendants were acquitted.
 (b) See *Rex v. Ford*, 1 Nev. & M. 776.

22 July 95. 28 NY 406

REGINA v. THE INHABITANTS OF THE TOWNSHIP OF DENTON.

1852.

This was an indictment for a nuisance in not repairing a highway, preferred against the inhabitants of the township of *Denton*, in the parish of *Manchester*, removed into the Queen's Bench by certiorari, and tried at the *Liverpool* Spring assizes, A. D. 1852, before Mr. Justice *CRESSWELL*.

The indictment contained four counts. On the first and second counts, stating the liability of the defendants to repair the highway in question at common law, no evidence was offered at the trial.

The third and fourth counts were framed upon the

Where an act of Parliament upon which an indictment was framed, was repealed after the indictment was found by the grand jury, but before plea pleaded: *Held*, that the judgment must be arrested.

CROWN CASES RESERVED.

1852. fourth section of the 59 *Geo. 3, c. 22*, which provided :
 —“That in any indictment, presentment, or other proceeding against the inhabitants of any of the said townships, for not repairing any highway within such township, it shall be sufficient to allege generally that the inhabitants of such township ought to repair and amend such highway, without setting forth any custom or prescription for that purpose, or referring to the authority of this act.”

The third count was as follows :—

That on the said 1st day of *March*, A.D. 1851, and long before there was and from thenceforth continually hitherto there hath been and still is in the township of *Denton*, in the parish of *Manchester*, in the county of *Lancaster*, a certain common and public Queen's highway, to wit, the *Stockport* and *Ashton* turnpike road leading from *Stockport*, in the county palatine of *Chester*, to near new houses in the county of *York*, used by and for all the liege subjects of our said lady the Queen, and her predecessors, with their horses, coaches, carts, carriages to go, return, pass, ride, and labour at their free will and pleasure. And that a certain part of the said last-mentioned Queen's highway, situate, lying, and being in the township of *Denton* aforesaid, in the parish of *Manchester* aforesaid, in the county of *Lancaster* aforesaid, beginning at and opposite to the west end of a certain garden occupied by one *Samuel Crabtree*, in the township of *Denton* aforesaid, in the county of *Lancaster* aforesaid, and extending from thence to a certain place called the *Three Lane Ends*, in the township of *Denton* aforesaid, in the county of *Lancaster* aforesaid, and containing in length, divers to wit, 467 yards, and in breadth, divers to wit, ten yards and a half, on the said 1st day of *March*, A.D. 1851, and thence continually afterwards until the day of the taking of this

inquisition at the township of *Denton* aforesaid, in the county of *Lancaster* aforesaid, was and yet is very ruinous, miry, deep, broken, and in great decay for want of due reparation and amendment of the same, so that the liege subjects of our said lady the Queen, with their horses, coaches, carts, and carriages in, through, by, and over the said last-mentioned part of the said Queen's highway, from the said 1st day of *March*, A.D. 1851, hitherto could not nor yet can go, return, pass, ride, and labour as they were wont and ought to do without great danger of their lives and loss of their goods, to the great damage and common nuisance of all the liege subjects of our lady the Queen going, returning, passing, riding, and labouring in, through, and over the said last-mentioned part of the said last-mentioned highway, to the evil example of all others in the like case offending, and against the peace of our said lady the Queen, her Crown and dignity; and that the said highway in this count mentioned is not a highway, in respect whereof certain proceedings mentioned in an Act of Parliament passed on the 8th day of *April*, A.D. 1819, to wit, an act entitled An Act for providing that the several highways within the parish of *Manchester* in the county palatine of *Lancaster*, shall be repaired by the inhabitants of the respective townships within which the same are situate, or any of the said proceedings have been had, or in respect whereof certain verdicts in the said acts of Parliament mentioned, or any of them have been given, or in respect whereof any verdict had before the passing of the said act of Parliament been obtained against the inhabitants of the parish of *Manchester* aforesaid at large. And that the inhabitants of the township of *Denton* aforesaid, in the county of *Lancaster* aforesaid, ought to repair and amend the said part of the said highway in

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REGINA
v.
DENTON
Inhabitants.

1852. this count mentioned, and so being in decay as last aforesaid, when and so often as it shall be necessary."

REGINA
v.
DENTON
Inhabitants. The 4th count was in the same form as the 3rd count, except that it omitted the last averment.

Plea. Not guilty.

After the finding of the indictment, but before plea pleaded, the stat. 59 *Geo. 3, c. 22*, was repealed by an Act of Parliament, entitled *An Act for relief to the several townships in the parish of Manchester, from the repairs of highways not situate within such township respectively*, 14 & 15 *Vict. c. 10*, and the later statute contained no re-enactment of the section upon which the 3rd and 4th counts were framed.

The jury found the defendants guilty on the 3rd count; and on the 20th *April*, a rule *nisi* was obtained in the Queen's Bench to arrest the judgment.

On the 9th *June*, A.D. 1852, this case was argued before Lord CAMPBELL C.J., COLERIDGE J., ERLE J., and CROMPTON J.

Atherton Q. C., and *J. A. Russell* for the Crown: *Knowles, Q. C.*, and *Cowling* for the defendants.

Atherton Q. C. The recent stat. 14 & 15 *Vict. c. 10*, only repealed 59 *Geo. 3, c. 22*, in form and not in substance. The Court would take notice that the subject-matter of the liability stated in the third count remained unchanged, and the question was, would the change in form occasioned by the repeal of the statute make a difference? The count was good when the indictment was found by the grand jury, and that being so, the Court could pronounce judgment upon it. If, by the interference of the Legislature, such a substantial change were made as to alter the essentials of the offence, the pending proceeding could not go on; but that was not so where the change effected by

the statute was only a change of form. This distinction seemed to be warranted by *Rex v. The Inhabitants of Mawgan*, 8 Ad. & E. 496. In that case there was a difference in substance occasioned by the repealing statute; but, here 14 & 15 Vict. c. 10, merely omits the fourth section of 59 Geo. 3, c. 22, and the only difference made is in respect of the form of words in which the accusation in the indictment is couched.

COLERIDGE J. referred to the observations of Lord Tenterden, in *Surtees v. Ellison*, 9 B. & C. 750, and to other decisions under the Bankrupt Laws (*a*).

Atherton Q. C. Lord Tenterden's observations in that case seemed to be stronger than the facts of the case demanded. The cases of *Hitchcock v. Way*, 6 Ad. & E. 943, and *Moon v. Durden*, 2 Exch. Rep. 22, are authorities to shew that acts of Parliament passed while proceedings are pending are not to be construed as affecting substantial rights.

Lord CAMPBELL C. J.—This is the case of a simple repeal of the former act.

Atherton Q. C. Whether the repealed or repealing act be looked at, in substance, the offence remained the same.

Knowles Q. C. and *Cowling*, were not called upon by the Court.

Lord CAMPBELL C. J.—It is admitted that without the act 59 Geo. 3, the count on which the jury have given a verdict for the Crown, would be bad, and that judgment could not be given upon it; and the question now is whether we can pronounce judgment

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(a) See *Hewson v. Head*, 9 B. & C. 754 n. *Palmer v. Moore*, 9 B. & C. 754, n. *Maggs v. Hunt*, 12 Mont. & Mac. 297. *Worth v. Budd*, 2 B. & Adol. 172; 1 Dowl. P. C. 328. *Phillips v. Hopwood*, 10 B. & C. 33.

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REGINA
v.
DENTON
Inhabitants.

or arrest the judgment? The general rule of law is that a repealed statute cannot be acted upon after its repeal, although all matters that have taken place under it before its repeal are valid and cannot be called in question. We are not at liberty to pronounce judgment under a repealed statute, although the statute was in force at the time of the preferring the indictment. This principle was acted upon in *Rex v. Mawgan* referred to in the argument, and I think that case is not distinguishable from the present. It is argued that there is a difference between the case where the repealing statute affects the substance of the proceeding, and where it affects only the form, but I do not think that such a distinction can be maintained. In *Rex v. Mawgan* the offence remained unaltered; the only difference made by the repealing statute was in the mode of procedure. The count, therefore, as the law stands is bad, and we are bound to arrest the judgment; and in doing so we give the act 14 & 15 Vict. c. 10, no retrospective operation, but deal with it only from the time of its passing.

COLERIDGE J.—We have authority upon the point, but if the matter were *res integra*, I think we must have arrived at the same conclusion. The count is bad at common law, and the act under which it was framed, and by which it would have been good, has been wholly repealed. The only question that remains then is, whether the fact of the proceeding being in course of process can make any difference. I do not think that it makes any difference; what has been perfected under operation of the statute is not to be disturbed; but if the statute be necessary for any farther step, it must be in force at the time of taking that farther step. This is laid down by Lord *Tenter-*

den, in *Surtees v. Ellison* (*a*), where he says, "It has long been established, that when an act of Parliament is repealed it must be considered except as to transactions past and closed, as if it had never existed." That is the correct rule of law on this subject, and is conclusive here. *Rex v. M'Kenzie*, Russ. & Ry. 429, is an authority to the same effect.

1852.

REGINA
v.
DENTON
Inhabitants.

ERLE J.—I also am of opinion that the judgment must be arrested; the rule of law being that a repealed statute, as regards proceedings after its repeal, is as if such a statute had never existed. This indictment charges the defendants with a neglect of duty imposed upon them by 59 Geo. 3, c. 22, in the form given by that act of Parliament; and between the time of the finding of the indictment by the grand jury and of pleading, the act is *repealed*. To ask this Court, after that, to give further operation to the proceeding and pronounce judgment upon the indictment framed under the act, is to seek to contravene the meaning of the word "repeal," according to the force given to it by the rule of law I have referred to. The argument as to the difference where a repealing statute affects matters of form and matters of substance, I think fails, for the liability of the defendants in this case is founded upon the very words of the repealed act.

CROMPTON J. concurred.

The rule to arrest the judgment was accordingly made absolute.

(a) 9 B. & C. 750.

1852.

REGINA v. RICHARD SILL.

The Court of Queen's Bench has the power to issue a special writ or order in the nature of a *certiorari*, under 4 & 5 Wm. 4, c. 36, for the removal of indictments for obtaining money under false pretences from the Sessions mentioned in that act, to the Central Criminal Court, notwithstanding 7 & 8 Geo. 4, c. 29, s. 53, taking away *certiorari*, in the case of indictments for obtaining money under false pretences.

AN indictment charging the defendant with obtaining money by false pretences having been found at the *Middlesex* sessions, in *Trinity* term, A.D. 1852;

Doyle, for the defendant, moved in the Queen's Bench before Lord CAMPBELL C. J., ERLE J., and CROMPTON J., for a rule *nisi* for a *certiorari*, in order that the defendant should have the benefit of a trial at the Central Criminal Court, before Judges of the superior Courts sitting there. He relied upon the 16th section of the Central Criminal Court Act, 4 & 5 Wm. 4, c. 36, which enacts, "that it shall be lawful for his Majesty's Court of King's Bench, or any Judge thereof, or any Commissioner of oyer and terminer and gaol delivery under this act, being a Judge of any of the superior Courts at *Westminster*, or the chief Judge or any other Judge of the Court of Bankruptcy, or the Recorder of the said city of *London* for the time being, if such Court, Judge or Recorder shall think proper to issue any writ or writs of certiorari, or other process directed to his Majesty's justices of the peace acting in and for the cities of *London* and *Westminster*, the liberty of the Tower of *London*, the borough of *Southwark*, and the counties of *Middlesex*, *Essex*, *Kent*, and *Surrey*, or either of them to certify and return into the said Court of oyer and terminer (a), indictments or presentments found or taken before the said justices of the peace, or any of them of any offences cognizable by virtue of this act, and the several re-

(a) Section 15, provides that year, before Judges of oyer and Sessions shall be holden in *London* terminer.
or the suburbs, twelve times a-

cognizances, examinations, and depositions relative to such indictments and presentments, so that the same offence may be dealt with, tried, and determined, by the said justices of oyer and terminer and gaol delivery ;" he also cited case of *Reg. v. Brier*, 19 L. J., M. C. 121.

1852.
SILL'S
Case.

Metcalf, for the Crown, shewed cause in the first instance.

The stat. 7 & 8 *Geo. 4*, c. 29, s. 53, expressly enacted "that no such indictment shall be removeable by *certiorari*." The indictment, in the present case, could not therefore be removed into the Queen's Bench, and this he submitted was an attempt to induce the Court to do indirectly what, by law, could not be done directly,—an attempt which he trusted the Court would not sanction. There was a specific enactment in the 53rd section 7 *Geo. 4*, c. 29, taking away the writ of certiorari in the case of false pretences, and that could not be held to be repealed by the general power, to remove certain indictments given to this Court, by the Central Criminal Court Act.

Doyle, in reply.

The stat. 4 & 5 *Wm. 4*, c. 36, s. 16, clearly empowered this Court to make an *order* for the removal of the indictment, so that it may be tried before one of the Judges of the superior Courts, sitting at the Central Criminal Court ; and the stat. 7 & 8 *Geo. 4*, c. 29, does not apply to such a case as the present.

Lord CAMPBELL C. J.—Probably what we should have been asked for was not strictly a writ of *certiorari*, but an *order* under the 16th section of 4 & 5 *Wm. 4*, c. 36, in the nature of a *certiorari*, to transfer the indictment from the *Middlesex* sessions to the Central Criminal Court, for trial there ; and we make that order. A writ of *certiorari* would remove the

1852.

SILL'S
Case.

indictment into this Court, a course which is forbidden by 7 & 8 *Geo. 4, c. 29, s. 53*. It is difficult to say absolutely that it cannot be further removed because it cannot be removed directly, but the Court would be slow in allowing that to be done indirectly, which it is forbidden to do directly.

COLERIDGE J.—It appears to me that the 6th section of 4 & 5 *Wm. 4, c. 36*, does not repeal the 53rd section of 7 & 8 *Geo. 4, c. 29*, but that the writs referred to in the former are different writs from those contemplated in the latter. The writ intended in the later act is, I think, a *special writ* to remove indictments cognizable under the statute at once into the Central Criminal Court without bringing them into the Court of Queen's Bench at all.

ERLE J. concurred.

CROMPTON J.—It is evident that the ordinary writ of *certiorari* cannot be meant by the 16th section as the power to issue the writ or process under it is given to a Judge of the Court of Bankruptcy.

The Court accordingly granted the rule.

Upon a subsequent day, 12th *June*, *Metcalf* obtained a rule *nisi* to quash the rule and remit the indictment to the *Middlesex* sessions unless the defendant immediately proceeded to trial at the Central Criminal Court, cause to be shewn next term.

The case, however, came on for trial at the *August* session at the Central Criminal Court, when the defendant was found guilty, and sentenced to two years' imprisonment (*a*).

(*a*) See *Sill v. The Queen*, (in Error), *post*.

REGINA v. —— MAJOR.

1852.

AN indictment for perjury upon an affidavit in Chancery having been preferred against the defendant at the Central Criminal Court, at the instance of the defendant it was removed into the Queen's Bench by certiorari, where he was tried, convicted, and sentenced to be imprisoned. The false oath on which the perjury was assigned related to a claim of money alleged by the prosecutors to be owing from the defendant to the estate of a deceased person, to whom they were executors; but the perjury was unsuccessful and occasioned no actual damage to the prosecutors.

In *Trinity* term, A. D. 1852, *Willes* moved, in the Bail Court, for a rule to shew cause why a side-bar rule to tax the costs of the prosecutors should not be rescinded; contending that the statute 5 & 6 Wm. & M., c. 11, s. 3 (a), applied only to cases where the prosecutor was in fact "grieved or injured," and that, as the false oath was ineffectual, and no injury was actually sustained, the prosecutors were not entitled to costs. He cited *Rex v. Ingleton*, 1 Wils. 139.

WIGHTMAN J.—The case of *Rex v. Ingleton* does not apply here, and the prosecutors are, in my opinion, entitled to costs under the statute. If the perjury is complete and *may* have caused damage to the prosecutors, that is sufficient. The false affidavit of the defendant in the matters in Chancery, put a difficulty and obstruction in the way of the prosecutors which they were obliged to remove. The rule, therefore, must be refused.

(a) As to the interpretation of this section of 5 & 6 Wm. & M. c. 11; see *Reg. v. Archibald Wilson, post*, p. 79.

The defendant was convicted of perjury on an indictment removed, at his instance, by certiorari: Held, that the prosecutors, who were executors of a deceased person, were entitled to costs under 5 & 6 Wm. & M. c. 11, "as persons grieved or injured," although the perjury occasioned them no actual damage, it being sufficient to bring the case within the stat. that the perjury might have caused them damage, and the false oath of the defendant having put a difficulty in their way which they were compelled to remove.

1852.

REGINA v. MILES HODGSON.

Where on the removal of an indictment from Sessions, by *certiorari*, a recognizance is given by sureties to answer for the appearance of the party indicted, for his pleading thereto, and at his own proper costs and charges procuring the issue joined to be tried, giving due notice to the prosecutor, and for his not departing, until discharged by the Court of Queen's Bench, such sureties are liable for the prosecutor's costs, in case of the conviction of the party indicted under 5 & 6 Wm. & M. c. 11, ss. 2 & 3.

THE defendant was one of the sureties of one *John Thornton*, against whom an indictment for a certain misdemeanor had been preferred at the Quarter Sessions of the county of *Westmorland*, and at whose instance the indictment had been removed into the Queen's Bench by *certiorari*. The said *John Thornton* was convicted in due course of law, and the costs of the prosecutor under the provisions of 5 & 6 Wm. & M. c. 11, ss. 2, 3, having been taxed he failed to pay them; whereupon an estreat was directed to the sheriff of the county of *Westmorland*, to inquire into the lands and tenements, &c., of certain persons mentioned in the schedule of the document.

The memorandum in the schedule respecting the defendant was as follows:—

“ *Michaelmas Term, 13 Vict. 1849. Miles Hodgson, of Kirby Lonsdale in the county of Westmorland, shoemaker, one of the sureties of John Thornton, because he did not pay to the prosecutor his costs, taxed according to the course of the said Court upon an indictment for certain misdemeanors whereof he was convicted, as by the course and practice of the said Court he ought to have done, but made default. Forty Pounds.* ”

The sheriff of *Westmorland* made a return that he had been served with a copy of an order made by Mr. Justice TALFOURD, by which the defendant was allowed till the eighth day of the next term to appear and plead to the estreat (a).

The defendant in his plea, craved oyer of the roll of

(a) As to the course of practice in pleading to an estreat, see 2 Burn's Just.—“ *Fines, Forfeitures and Recognizances*,” ed. by Chitty, 842.

estreat, whereby it appeared that the above-named *John Thornton* was indebted to the Crown in the sum of eighty pounds, one *Henry Robinson* in the sum of forty pounds, and *Miles Hodgson*, the defendant, in forty pounds, *Thornton* for not paying the costs of the prosecutor upon an indictment, upon which he had been convicted, and *Robinson* and *Hodgson* as his sureties for the payment of the same.

1852.

HODGSON'S
Case.

The plea then protested against the validity of the estreat, but for plea nevertheless and for the discharge of the recognizance, pleaded setting out the recognizances, the conditions of which were "That if the said *John Thornton* shall appear in the Queen's Bench, at *Westminster* on the 22nd day of *May*, instant, in the next Trinity term, and shall plead to all and singular indictments of whatever misdemeanors whereof he stands indicted, and at his own proper costs and charges shall cause and procure the issue or issues that may be joined thereon to be tried in the same term, or at the next assizes to be holden after the same term in and for the county of *Westmoreland*, if the said court shall not appoint any other time for the trial thereof, then at such other time, and shall give due notice of such trial to the prosecutor or his attorney, and shall appear from day to day in the said Court, and not depart until discharged by the said Court, then this recognizance to be void or else remain in full force."

This recognizance appeared to have been taken before *John Tathem*, Esq., one of the justices for the county, &c.

The plea then stated that before the time of entering into the said recognizance a bill of indictment had been found at the Quarter Sessions for the county of *Westmoreland* against the said *John Thornton* for the nonpayment of certain costs awarded against him by the sessions upon the trial

1852.

HODGSON's
Case.

of an appeal against the certificate of two justices of the peace for the stopping up and diverting part of a public footway in the town of *Kirkby Lonsdale*, in which he the said *John Thornton* appeared as appellant;—that the said indictment was removed by *certiorari*; that *Thornton* appeared and pleaded not guilty to the said indictment, upon which plea issue was joined; that *Thornton*, on the 6th day of *August*, at *Appleby*, in the said county of *Westmoreland*, had at his own proper costs and charges caused the said issue to be tried in due course of law at the Assizes then and there holden for the said county, the Court of Queen's Bench not having appointed any other time for the trial of the said issue; and that the said *John Thornton* gave due notice of trial to the prosecutors; that upon the trial of the said issue the said *John Thornton* was found guilty, and that he did appear from day to day in the Queen's Bench, and did not depart therefrom until he was committed by the said Court to prison; that he was adjudged by the said Court to imprisonment for two months; that he underwent the said imprisonment, and was then discharged by the said Court of Queen's Bench without a day being given him to appear, and that no other judgment was ever given against him by the said Court.

Replication: That at the time of granting the said writ of *certiorari*, the said Court of Queen's Bench ordered that the said *John Thornton* should enter into a recognizance of eighty pounds, with two manucaptors or sureties, in forty pounds each, according to the statute; that the said *John Thornton*, and *Henry Robinson*, and *Miles Hodgson*, as the manucaptors or sureties of the said *John Thornton*, did enter into the said recognizance mentioned in the said estreat; that after the conviction of the said *John Thornton*, the Court of Queen's Bench gave to the prosecutors of the said

indictment, their costs, which amounted to 79*l.* 2*s.*; 1852.
 that the allocatur of the coroner was served upon the
 said *John Thornton*, and the amount demanded of
 him; that the said *John Thornton* refused to pay the
 same; and that the said allocatur was afterwards
 served upon *Henry Robinson* and the defendant, the
 manucaptors or sureties of the said *John Thornton*;
 that afterwards an attachment was issued against the
 said *John Thornton* for contempt, in nonpayment of the
 said amount, that he was attached, and that the said
 sum of 79*l.* 2*s.* remained unpaid at the time of the
 said attachment and estreat.

HODGSON'S
Case.

To this replication the defendant demurred.

On the 8th *June*, A. D. 1852, the demurrer was argued in the Court of Exchequer before POLLOCK C. B., ALDERSON B., PLATT B., and MARTIN B.

Sir *F. Thesiger* (Attorney General), and *Atherton Q. C.*, for the Crown. *Pashley Q. C.*, and *Henniker* for the defendant.

Pashley Q. C. called the attention of the Court to the *condition* of the recognizance entered into by the defendant as set out in his plea (*a*); which condition had been fully complied with. The defendant, as one of the manucaptors or sureties of *John Thornton*, had entered into a contract with the Crown which was expressed in the condition of the recognizance, and that contract, he maintained, had been fulfilled. The defendant did not say that the recognizance ought to be discharged, but that he had done all that he had bound himself to do; and that if the Crown intended to bind him to pay the prosecutor his costs, or to see them paid, that ought to have been expressed in the condition of the recognizance. The words of the third

(*a*) See *ante*, p. 15.

1852. section of the statute relating to the removal of indict-

HODGSON'S
Case.

ments by *certiorari*, 5 & 6 Wm. & M. c. 11, it was true, said that the said recognizance should not be discharged till the costs so taxed were paid ; but the question before the Court was a question of contract, and no one could be bound beyond the terms of the contract into which he entered. A contract had been entered into between the Crown and the subject ; and that as expressed in the condition of the recognizance, had been performed by the defendant. But in the next place the recognizance itself was void ; it appeared to have been taken before *John Tathem* Esq., one of the justices "for" the county of *Westmoreland*, whereas in order to give a justice jurisdiction it should appear that he was a justice "in and for" the county. He cited *Reg. v Stockton*, 7 Q. B. 520 ; *Reg. v. Lynch*, 7 Irish Equity Rep. 263 ; *Taylor v. Clemson*, 11 Cl. & Fin. 610 ; *Day v. King*, 5 Ad. & E. 359 ; *Reg. v. Toke*, 8 Ad. & E. 227.

Sir *F. Thesiger* (Attorney General). In effect the demurrer amounted to an application to discharge the defendant's recognizance. The form and condition of the recognizance are given by the stat. of *Wm. & M.*, which has incorporated a condition into the recognizance,—a point which has been settled by numerous decisions. In the case *Rex v. Teal*, 13 East, 4, it was held, that where on the removing an indictment from the sessions by *certiorari*, a recognizance was given by two sureties in 20*l.* each, under 5 & 6 *Wm. & M. c. 1*, ss. 2, 3, to secure the costs, such recognizance should not be discharged till all the costs were paid, though they exceeded 40*l.*, *Rex v. Finmore*, 8 T. R. 409, and *Reg. v. Byzant*, 7 Dowl. 680, were also authorities to the same effect.

The *Attorney General* was here stopped by the Court.

POLLOCK C. B.—All the precedents are against the second point urged by the defendant's counsel, and the cases to which the *Attorney General* has called our attention are conclusive as to the other. No distinction can be drawn between the present case, and an application to discharge the recognizance. The Crown is therefore entitled to judgment.

1852.

HODGSON's Case.

ALDERSON B. and **PLATT B.** concurred.

MARTIN B.—Regarding this as a question of a contract between the Crown and the defendant, but for the decisions cited by the *Attorney General*, I should have been disposed to have come to a different conclusion; but as it is we are bound by authority, and I agree that there must be judgment for the Crown.

REGINA v. WILLIAM MITCHELL, WILLIAM JACKSON and SARAH BROWN.

1852.

MITCHELL's Case (a).

(*Note.*)

The course directed by Mr. Baron ALDERSON at the *Liverpool Spring assizes*, A. D. 1852, on the trial of these prisoners, to be pursued in framing indictments in cases of robberies under aggravated circumstances, seems to have been to some extent misunderstood; and from an observation made by Mr. Justice ERLE, when the case reserved was under the consideration of the Judges, it appears to have been supposed that his Lordship suggested the adoption of an *additional count*

in the indictment, instead of the insertion of an *averment* of an assault with intent to rob, in the count charging a robbery.

A count charging an assault with intent to rob, was rarely in practice adopted in indictments for robbery; and it was ruled in *R. v. Gough*, 2 Moo. & M. 71, that the prosecutor might, in the discretion of the Court, be put to his election where the indictment contained a count for each offence.

Mr. Baron ALDERSON in stating

(a) See 2 Den. C. C. 468.

1852.

MITCHELL'S
Case.

the case, *Reg. v. Mitchell*, remarked "that the inconvenience anticipated in that case might in future be avoided, he had thought it advisable to direct a return to the old form of indictment, which as he was assured by the clerk of assize, formerly contained an express averment of an assault with intent to rob."

According to the old form of indictment used in *Lancashire* (but not, as I have ascertained by personal inquiry at the Indictment Office in *York*, on other parts of the Northern Circuit,—a circumstance that accounts for the difficulty which arose in *Reg. v. Reid* and *Ackroyd's* case, 2 Den. C. C. 88), before the passing of 14 & 15 Vict. c. 100, an indictment for a robbery contained an averment first of an assault with intent to rob, and then a statement of an actual robbery; and inasmuch as each by itself would have been a *felony*, it would, at common law, have been competent to the jury to convict of the part of the count charging an assault with intent to rob, *that part being a felony*, made a felony by 7 Wm. 4 & 1 Vict. c. 87, s. 6,—because wherever a statute makes an offence a felony, it incidentally gives to it all the properties of a felony at common law. 1 Hawk. P. C. c. 38, s. 19; *R. v. Gray*, Stra. 481. In indictments for burglary the same count has always charged a breaking and entering with intent to steal, and then an actual stealing; and the jury might acquit of the burglary, and convict of the larceny, or *vice versa*. 1 Hale P. C. 559.

In the present case the indictment charged that the three prisoners *Mitchell, Jackson and Brown* in and upon *Thomas Tatem*, together did make an assault, and him in bodily fear and danger of

his life *then and there together feloniously* did put, and certain money of the said *Thomas Tatem* from his person and against his will *then and there together feloniously and violently* did steal. The actual robbery could not be proved; but the jury found that the prisoners had *together assaulted* the prosecutor with intent to rob him.

The question then arose,—as the count contained no averment of such aggravated assault with intent to rob,—had the Court the power to sentence the prisoners to transportation for life under 7 Wm. 4 & 1 Vict. c. 87, s. 3?

No failure of justice took place in this instance, for the Judges held that under the stat. 14 & 15 Vict. c. 100, s. 11, if a robbery under aggravated circumstances be charged in an indictment the jury may find an *aggravated felonious assault with intent to rob*; but if the old form in use at *Liverpool* containing an averment of an assault with intent to rob had been retained, there would have been an averment of an assault by three persons together with intent to rob, as well as an averment of a robbery by three persons together, and the case would have been directly within the stat. 7 Wm. 4 & 1 Vict. c. 87, s. 3.

It would seem therefore, as having regard both to the common law and the stat. 14 & 15 Vict. c. 100, s. 11, that the *correct* mode of drawing an indictment for robbery where the evidence points to a conviction for a felonious assault, is to insert an averment for an assault with intent to rob, though after the decision of the Judges in this case (*Regina v. Mitchell*, 2 Den. C. C. 468), its omission would be held to be cured by the act of Parliament.

REGINA v. MICHAEL MANNING AND JOHN SMITH. 1852.

MICHAEL MANNING and *John Smith* were tried before R. B. ARMSTRONG Esq., Recorder of *Manchester*, at the *Manchester* Borough Sessions, on the 5th of *August*, 1852, for stealing on the 17th of *July*, twenty-four bags, the property of *John Sheridan*. The prosecutor was a potatoe dealer, and used bags in that trade, and he also dealt largely in bags, which he bought and sold. The prisoner *Manning* had been for several years in the prosecutor's service, and had the care of his warehouse, in which the bags were kept. The prisoner *Smith* had for five years regularly supplied the prosecutor with bags which he made, and from time to time, when he had finished a lot, his custom was to take them and put them down at the warehouse door of the prosecutor, outside the warehouse, and very shortly after any bags had been so left by him, either he or his wife, but generally his wife, used to come and receive payment for them from the prosecutor. On the night of the 16th of *July*, the prosecutor had a quantity of bags in his warehouse marked. On the morning of the 17th of *July*, prisoner *Manning* went into his master's warehouse and brought out twenty-four of the bags which had been

A. had the charge of the prosecutor's warehouse in which bags were kept; *B.* for some years had been in the habit of supplying the prosecutor with bags which were usually placed outside the warehouse, and shortly after so leaving them, either *B.* or his wife called and received payment for them. *A.* went into his master's warehouse, and removed twenty-four bags which had been marked by his master, and placed them outside

the warehouse, in the place where *B.* used to deposit his bags before payment for them. Soon afterwards the wife of *B.* came and claimed payment for the said twenty-four bags. The prosecutor then sent for the prisoner *B.* who upon being asked respecting the bags, said that they had been placed there an hour previously by him, and demanded payment for them. The jury found that the bags had been so removed in pursuance of a previous arrangement between *A.* and *B.* Held, that *A.* was rightly convicted of larceny, and that *B.* was an accessory before the fact.

1852.

MANNING's Case.

so marked by his master on the previous night, and put them down outside the warehouse, by the door, at the place where *Smith* used to deposit the bags he brought for the prosecutor, and for which he had to be paid. Shortly after *Manning* had brought the prosecutor's bags out of his warehouse, and so placed them at the door, *Smith*'s wife came and asked payment for them as for bags that her husband had brought there that morning. Upon this *Smith* was sent for, and was told what his wife had said, and the bags which were then lying where *Manning* had placed them were pointed out to him, and he was asked whether he had brought those bags there ; he said yes, had brought them there an hour before, and that he and his wife had been working at them till twelve o'clock the night before, in order to finish them. "Nay," said the prosecutor, "those bags are mine." "Yes," replied *Smith*, "they will be yours when you have paid for them." Upon this the prosecutor pointed to the two prisoners (*Manning* being then also present) the marks that had been put upon the bags the night before, when they both turned the colour of this (holding up a piece of red blotting paper) and they were given into custody.

The learned Recorder told the jury that if they were satisfied that *Manning* brought his master's bags out of the warehouse, and placed them outside by the door in the manner stated, for the purpose of enabling *Smith* to receive payment for them from his master, and with the intent that he should do so as if they had been new bags just then finished by *Smith*, and for which he would be entitled to be paid, that that would be a larceny ; and that if they were satisfied that this had been so done by *Manning* in pursuance of previous concert and arrangement between him and *Smith*, that *Smith*, though absent when the bags were so removed out of the warehouse, would be an acces-

sory before the fact to the felony. The jury said they were satisfied that the bags had been so removed out of the warehouse by *Manning* for the purpose and with the intent aforesaid, and that the same had been done in pursuance of a previous arrangement between him and *Smith*, and they found both the prisoners guilty.

1852.
MANNING'S
Case.

The prisoners were sentenced to be severally imprisoned in the *Borough* gaol, and to be there kept to hard labour for six months.

The question for the opinion of the Court was, whether the facts stated and found amounted to larceny.

On the 13th November, A. D. 1852, this case was considered by JERVIS C. J., COLERIDGE J., ALDERSON B., CRESSWELL J., and PLATT B.

Cross for the Crown (*a*), cited *Reg. v. Hall*, 1 Den C. C. 381, in which the Judges held that where *A.* took *B.*'s goods wrongfully, and offered them for sale to *B.* as the goods of another, he was held guilty of larceny.

JERVIS C. J.—This case is clear; the direction of the Recorder was quite right, and both the prisoners have been properly convicted. The case of *Reg. v. Hall*, 1 Den. C. C. 381, is expressly in point.

ALDERSON B.—There is no doubt that the prisoner *Manning* has been properly convicted of larceny; and *Smith*, though not present when the sacks were removed, was an accessory before the fact.

(*a*) No counsel appeared for the prisoner.

1852.

REGINA v. THOMAS HENSON.

To bring a horse infect-
ed with the
glanders into
a public place
to the dan-
ger of in-
fecting the
Queen's sub-
jects is a mis-
demeanor at
common law;
and Held,
that an in-
dictment
which stated
that the de-
fendant knew
that a mare
which he
brought into
a fair was
glandered,
was, after
verdict, good,
without an
averment
that the de-
fendant knew
that the
glanders was
a disease
communica-
ble to man.

An indictment charging the defendant with a mis-demeanor at Common Law (*a*) in bringing a glandered mare into a public place, was found on the 28th *June*, A.D. 1852, at the Quarter Sessions for the county of *Leicester*. It was removed into the Queen's Bench, by *certiorari*, and came on for trial at the *Leicestershire* Summer assizes, 21st *July*, A.D. 1852, before Mr. Justice *COLERIDGE*. The indictment contained three counts which were as follows:—

1st count. The jurors for our lady the Queen present that *James Henson* late of *Melton Mowbray* in the county of *Leicester* labourer on the first day of *June* in the 15th year of the reign of our said lady the Queen at *Melton Mowbray* aforesaid in the county aforesaid was possessed of a certain mare which said mare was then and there infected with a contagious infectious and dangerous disease called the *glanders*, and the said *James Henson* well knowing the premises afterwards and whilst the said mare was so infected as aforesaid on the day and year aforesaid with force and arms at *Melton Mowbray* aforesaid in the county aforesaid unlawfully wilfully wickedly and injuriously did bring and cause to be brought the said mare so infected as aforesaid into and along a certain open public way and place on which then of right were divers liege subjects of our said lady the Queen then going passing and staying and amidst and among divers liege subjects of our said lady the Queen who were then and there in the

(a) See 2 Chit. Crim. L. 553, Com. 161; 4 M. & S. 73, 272; 4 554; 3 Burn's Just. "Horse;" Went. 213; Com. Dig. Lect. 12 Wms. L. Dict. "Horse;" 4 Bla. (L).

said public way and place to the great danger of infecting with the said contagious infectious and dangerous disease called the *glanders* the liege subjects of our said lady the Queen who on the said day and time were in and near the said public way and place to the damage and common nuisance of all the said liege subjects of our said lady the Queen to the evil example of all others in the like case offending and against the peace of our said lady the Queen her Crown and dignity.

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2nd count. And the jurors aforesaid upon their oath aforesaid do further present that afterwards to wit on the day and year aforesaid at *Melton Mowbray* aforesaid in the county aforesaid the said *James Henson* was possessed of a certain other mare which said last mentioned mare was then and there infected with a contagious infectious and dangerous disease to wit a disease called the *glanders* and that the said *James Henson* well knowing the premises last aforesaid and whilst the said last-mentioned mare was so infected as aforesaid on the day and year aforesaid with force and arms at *Melton Mowbray* aforesaid in the county aforesaid unlawfully wickedly wilfully and injuriously did bring and cause to be brought the said last mentioned mare so infected as aforesaid into a certain fair called the *Melton Mowbray Whitsun Fair* during the period when the liege subjects of our said lady the Queen were then and there holding the said fair which was then and there public and open to all the liege subjects of our said lady the Queen for the purpose of buying and selling horses and other cattle therein and that the said *James Henson* well knowing the premises as last aforesaid then and there kept and continued to keep the said mare so infected as aforesaid for a long space of time to wit for the space of one hour then next following and in which said fair then of right were divers horses and

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other cattle of certain liege subjects of our said lady the Queen then and there passing and being by means of which said several last mentioned premises the said last mentioned horses and other cattle so passing and being along and in the said fair became and were liable to be infected (a) by the contagious infectious and dangerous disease with which the said mare of the said *James Henson* was so infected as aforesaid to the damage and common nuisance of the liege subjects of our said lady the Queen frequenting the said fair and using the same for the purpose of buying and selling horses and other cattle therein to the evil example of all others in the like case offending and against the peace of our said lady the Queen her Crown and dignity.

3rd count. And the jurors aforesaid upon their oath aforesaid do further present that afterwards to wit on the day and year aforesaid at *Melton Mowbray* aforesaid in the county aforesaid the said *James Henson* was possessed of a certain other mare which last mentioned mare was then and there infected with a contagious infectious and dangerous disease to wit a disease called the *glanders* and that the said *James Henson* well knowing the last mentioned premises afterwards and whilst the said last mentioned mare was so infected as aforesaid on the day and year aforesaid with force and arms at *Melton Mowbray* aforesaid in the county aforesaid unlawfully and injuriously did bring and cause to be brought the said last mentioned mare so infected as aforesaid into a certain open and public way and place called the *Burton End* in *Melton Mowbray* aforesaid in which public way and place

(a) It is enacted by stat. 32 Hen. 8, c. 13, s. 9. No person shall have or put to pasture any horse, gelding, or mare infected with scab or mange, in any common or common fields on pain of

10s.; which offence shall be in quirable in the leet as other common annoyances be, and the forfeitures shall be to the lord of the leet.

there were divers others horses and other cattle of certain liege subjects of our said lady the Queen then and there passing and being and that the said *James Henson* well knowing the premises aforesaid then and there kept and continued the said mare of which the said *James Henson* was so possessed as last aforesaid and which was then and there so infected as aforesaid for a long space of time to wit for the space of one hour then next following during all which time there were divers other horses and other cattle of certain liege subjects of our said lady the Queen then and there passing and being by means of which said several last mentioned premises the said horses and other cattle so passing and being along and in the said open public way and place became and were liable to be infected by the contagious infectious and dangerous disease with which the said mare of the said *James Henson* was so infected as aforesaid to the damage and common nuisance of the liege subjects of our said lady the Queen then having horses and other cattle in the said open and public way and place to the evil example of all others in the like case offending and against the peace of our said lady the Queen her Crown and dignity.

Plea : not guilty.

The jury found a verdict for the Crown.

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Case.

On the 3rd November, A.D. 1852, *Miller*, Serjt., for the defendant, moved in the Queen's Bench before Lord CAMPBELL C. J., COLERIDGE J., WIGHTMAN J., and ERLE J., to arrest the judgment. He contended that the first count was bad inasmuch as it contained no averment that the defendant *knew* that the glanders was a disease that was infectious so as to be communicable to man ; and in order to make the act charged in the indictment an indictable offence at common law, it was necessary that a *scienter* should be

1852. stated (*a*). Unless it were proved the verdict would be wrong, and being necessary to be proved, there ought to have been a corresponding allegation in the indictment.

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Lord CAMPBELL C. J.—This indictment contains an allegation that he knew the mare to be glandered ; that is enough.

Miller Serjt. The defendant might have known that the glanders was communicable from one horse to another without contact ; but that the disease was communicable from a horse to a man (*b*) he might not have known ; and as a matter of fact he did not know it.

COLERIDGE J.—In the case of *Rex v. Vantandillo* 4 M. & S. 73, which was an indictment for exposing a child infected with the small-pox in the public streets, the indictment contained no averment that the defendant knew that the disease was infectious ; yet the Judge in passing sentence said, “there can be no doubt that if a person unlawfully, injuriously, and with a full knowledge of the fact, exposes in a public highway a person infected with a contagious disorder, it is a common nuisance to all subjects, and indictable as such.”

Miller Serjt. The law as laid down by the learned Judge in that case is not questioned ; he said, where “the defendant with a full knowledge of the fact ;”—that must be of the existence of the disorder and of its infectious nature.

Lord CAMPBELL C. J.—Suppose the case were one of exposing a person infected with the small-pox to the

(*a*) See 2 Chitty's Crim. L. 553, note.

(*b*) In the description of the glanders as a disease most fatal to horses, in the *Cyclopædia of the Society of Useful Knowledge*, tit. “Horse,” there is no suggestion that the glanders is a disease communicable from horses to man ; but

there appears to be no doubt that it is so. In the public journals, February 5, 1853, there is an account of the destruction of a whole family, consisting of a man, his wife, and four children, by glanders, communicated to them by a horse which the man had purchased from a horse-dealer.

danger of the Queen's liege subjects, would you say that an allegation that the defendant knew that the small-pox was *an infectious disease* would be necessary ?

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Miller Serjt. That would be a different case. In the case of small-pox there would be a human being actually suffering, and experience, familiar to all the world, that other human beings would be in danger of infection.

COLERIDGE J.—The indictment states he “was possessed of a certain mare, which said mare was then and there infected with a contagious, infectious, and dangerous disease, called the glanders, and that he well *knowing the premises*, afterwards and whilst the said mare was so infected, unlawfully, wilfully, wickedly, and injuriously did bring, and cause to be brought, the said mare so infected as aforesaid, into and along a certain open public way and place ;” therefore he knew not only that the horse was glandered but that the glanders was a contagious disease.

Miller Serjt. That may be sufficient to shew that he knew the disease was communicable from one horse to another ; but it does not imply any knowledge that it was a disease communicable from horses to men. Nor is it alleged that it was.

COLERIDGE J.—But the indictment goes on to state that he brought the mare into a public place “amidst and among divers liege subjects of our said lady the Queen, who were then and there in the said public way and place, *to the great danger of infecting with the said contagious, infectious, and dangerous disease, called the glanders, the said liege subjects.*” Surely that, after verdict, is sufficient.

White, for the Crown, was not called upon.

Lord CAMPBELL C. J.—The Court is of opinion that the count is abundantly good, and the motion to arrest the judgment (a) must be refused.

(a) The Court then sentenced the defendant to pay a fine of 10*l.* and to be imprisoned in the Queen's prison till the same was paid.

1852.

REGINA v. CHARLES PROBERT, WILLIAM HAMP, AND WILLIAM WATKINS.

Where one of several defendants obtained a *certiorari* for the removal of an indictment into the Queen's Bench, and a *procedendo* was moved for on the ground that the *certiorari improvide emanavit*, inasmuch as the other defendants had not joined in the application for the writ, and had not, under 5 & 6 Wm. & M. c. 11, entered into recognizances to pay the costs of the prosecutrix in case of their conviction:

Held, that the defendant on whose application the *certiorari* was granted, (being a person to whose responsibility

there appeared no objection), might enter into recognizances to pay costs in case of the conviction of himself or of the other defendants, or either of them, and that under these circumstances the *procedendo* would not be ordered.

An indictment was found at the Central Criminal Court charging the defendants with a conspiracy to defraud the prosecutrix, *Mary Ann Broom*, of her monies, by keeping certain witnesses out of the way at the trial of an indictment, arising out of a charge of cheating at cards at *Brighton*, made against one *John Broom* and others.

The defendant, the Reverend *Charles Probert*, a clerk in holy orders, applied to Mr. Justice CROMPTON, at chambers, for a writ of *certiorari* to remove the indictment into the Queen's Bench, where he was anxious the trial should take place, and the learned Judge granted the application.

On the 5th November, A.D. 1852, a rule *nisi* was obtained in the Bail Court from CROMPTON J., calling on the defendants to shew cause why the writ of *certiorari* which had issued should not be quashed, and why a writ of *procedendo* to remove the indictment back again to the Central Criminal Court, on the ground *quia improvide emanavit* should not issue.

Against which rule cause was shewn on the 19th November.

Parry and *Metcalf* for the Crown. *Wilkins Serjt.* and *Huddleston* for the defendants.

Wilkins Serjt. The affidavit on which the *certiorari*

was obtained was amply sufficient, and was uncontradicted. It was a case in which difficult points of law were likely to arise, and in which it was desirable to have the power of summoning a special jury. With respect to the objection that the application had not been made on the part of all the defendants, there were now affidavits shewing that they all concurred in the application for the *certiorari*.

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PROBERT'S Case.

Parry. No ground was laid for the application for the *certiorari*. There was no pretence for saying that a fair trial could not be had at the Central Criminal Court, where it could be taken before Judges of the superior Courts. The fact that the defendant *Probert* was a clergyman made no difference, and the suggestion in his affidavit that it would be prejudicial to his character as a clergyman to stand at the bar of the *Old Bailey* could be no reason for granting the writ. It was not shewn what the difficult points of law were which were likely to arise. Beside the other two defendants were not parties to the application, and were not under recognizances to pay the costs of the prosecutrix in case of their conviction ; and in that case if the *certiorari* were allowed to stand, and the defendant *Probert* were acquitted, the prosecutrix would have to bear the increased expense of a trial in the Queen's Bench, although the two other defendants might be convicted.

CROMPTON J.—Perhaps I acted rather hastily at chambers in granting the *certiorari* on the application of one of the defendants. All the defendants should, I think, enter into recognizances.

Parry. The prosecutrix has no confidence in the recognizances of any of the parties but Mr. *Probert*.

Wilkins Serjt. said that he was ready to consent that Mr. *Probert* should enter into recognizances for the other two defendants for the payment of the costs of the prosecutrix, under the statute of *Wm. & M.*, in case of their conviction.

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CROMPTON J. said that he thought that would, under the circumstances, be the proper course, and the counsel for the Crown assenting, the defendant *Probert* entered into recognizances to pay the costs of the prosecutrix in case of the conviction of himself, or of both or either of the other two defendants (*a*).

(*a*) *Huddleston* than moved, on the part of the defendants, for a rule, calling on the prosecutrix to shew cause why she should not be compelled to give the *particulars* of the charges intended to be relied on in the general counts of the indictment. One set of counts set out the alleged conspiracy with particularity, but there were also general counts simply laying a conspiracy to cheat and defraud the prosecutrix of her money by divers crafty and subtle means.

CROMPTON J.—Have you an affidavit stating that you do not know on what the prosecution intend to rely?

Huddleston. Such an affidavit has never been held to be necessary. In the case of *Reg. v. Alleyne and others*, Q. B. Mich. 1851, there was an indictment for conspiracy,

in which there were nine counts. Eight of them set out particular charges, and the ninth count set out, in general terms, a conspiracy to defraud by divers subtle means and contrivances, and the court upon argument held that the defendants were entitled to have particulars of the specific charges intended to be relied on in support of the general count. He cited *Reg. v. Curwood*, 3 A. & E. 815; *Rex v. Hodson*, 3 C. & P. 422, and *Reg. v. Hamilton and others*, 7 C. & P. 448; in neither of which cases was any affidavit used.

Rule nisi.

This rule was afterwards discharged upon an undertaking on the part of the prosecution to confine themselves to the charges stated in the special counts.

1852.

REGINA v. WILLIAM POVEY.

In order to establish the fact of a marriage in *Scotland*,

At a general session of gaol delivery, holden for the jurisdiction of the Central Criminal Court, on *Monday*, it is necessary that some witness conversant with the law of *Scotland* as to marriage should be called. And where a woman present at a marriage ceremony in *Scotland*, performed in a private house, by a minister of a congregation—but whether or not of the Kirk she did not know—stated that she herself had been married in the same way; that parties always married in *Scotland* in private houses, and that the parties after the ceremony had lived together as man and wife: *Held*, that her evidence was insufficient to prove the law of marriage in *Scotland*, or to establish a marriage in fact.

day, the 25th day of November, 1852, William Povey was tried before the Common Serjeant, *Edward Bullock*, Esq., on an indictment charging him with having at the parish of *St. Cuthbert, Edinborough*, in that part of *Great Britain*, called *Scotland*, feloniously married one *Isabella Graham*, during the life of *Jane*, his wife.

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To prove the marriage in *Scotland*, a witness was called, who stated that she (being the sister of *Isabella Graham*, above named), was present at a ceremony performed by a minister of a congregation, but whether of the Kirk she did not know, in the private house of the witness in *Edinborough*, that the witness herself was married in the same way, and that parties always married in *Scotland* in private houses. That the prisoner and her sister lived together in the witness's house as man and wife, for a few days after the ceremony, and then left for *England*.

It was contended, on behalf of the prisoner, that better evidence of the validity of the second marriage, according to the law of *Scotland*, should have been given; and that some person, sufficiently conversant with that law, should have been called to prove that it was a legal and valid marriage. The Common Serjeant, however, left it to the jury to find the prisoner guilty, if they would presume from the facts proved, a marriage valid by the law of *Scotland*. The jury found him guilty. It appearing to the learned Judge, however, that the point raised on the trial was one of doubt, and entitled to consideration: he postponed judgment and committed the prisoner to the custody of the keeper to the gaol of *Newgate*, until the next sessions, in order that the opinion of the Judges might be taken:—Whether the evidence given was sufficient to justify the finding of the jury or whether some witness, conversant with the law of *Scotland*, should have been called to say whether the

1852. facts proved constituted a valid marriage according to that law?

Povey's Case.

On the 13th December, A.D. 1852, this case was argued before JERVIS C. J., COLERIDGE J., ALDERSON B., CRESSWELL J., and PLATT B.

Robinson, for the Crown. *Parry*, for the prisoner.

Parry. In the first place, it was necessary in cases of alleged bigamy to prove an actual marriage; and then in the case of a marriage celebrated in a foreign country, some witness, or witnesses should be called, who were conversant with the law of that country, to shew that the marriage so celebrated was a valid marriage. In *Morris v. Miller*, 4 Burr. 2057, it was expressly held that a marriage in fact must be proved, though in civil cases, for many purposes, the fact that parties lived together as man and wife may be considered to amount to sufficient *prima facie* evidence of marriage. But here conceding that the witnesses spoke to certain facts that might be presumed to belong to the ceremony of marriage, she not being skilled in the law of *Scotland*,—and for the purposes of this argument *Scotland* was a foreign country,—was unable to give any evidence as to whether the facts she spoke to as having taken place, amounted to a valid and legal marriage. The facts having been brought before the Court, a witness conversant with the law of *Scotland*, whether professionally or otherwise, should have been examined in order to shew whether these facts constituted a marriage, *Dalrymple v. Dalrymple*, 2 Hagg. Con. 54. The *Sussex Peerage case*, 11 Cl. & Fin. 85. (He was then stopped by the Court).

Robinson. No professional expert was required to prove the requisites of a valid marriage; and the jury were justified from the evidence given in the case to infer that an actual marriage had taken place There

was the ceremony, or at least what the parties themselves represented to be the ceremony, of marriage, and that was followed by cohabitation. Besides the conduct of the prisoner was a fit subject for the consideration of the jury. The Court of Common Pleas, in the case of *Vanderdonckt v. Thellusson*, 19 L. J., C. B. 12, decided that any person conversant with foreign law is a competent witness (*a*). There a person, who was a hotel-keeper in *London*, but had formerly been a merchant and stockbroker in *Brussels*, and who stated that he was acquainted with the law of *Belgium* concerning promissory notes and bills of exchange, was allowed to give evidence to prove that by the law of *Belgium* it was unnecessary to present a promissory note at the place where it was made payable in the body of the note. That case unquestionably shews that a professional person, or expert, is not the only witness that may be called to give evidence upon questions of foreign law. Practical knowledge was all that was necessary to give competency; and that the witness in this case possessed, as it appears that she stated all marriages in *Scotland* to be celebrated in private houses, and that the ceremony of her own marriage was exactly similar to that of the alleged second marriage of the prisoner.

(*a*) The case referred to by the learned counsel seems to fall within the principle, that if the question of law relates to a foreign *custom* or *usage*, any witness will be admissible acquainted with the fact, rather than to contravene the rule laid down by the House of Lords on the universal opinion of the Judges in the *Sussex Peer. Ca.* 11 Cl. & Fin. 134. *Lush*, who argued in favour of the admission of the evidence, put the case as one of *commercial custom* with which the witness, as a merchant and stockbroker at *Brussels*, was in the course

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of his business conversant. *CRESSWELL* J., distinguished the case from the rule in the *Sussex Peerage case*; and *MAULE* J., in giving judgment said, the question is whether he was a person whose business it had been, and who had made it his business to attend to matters of that sort on which his evidence was offered.

And see the opinions of *POLLOCK* C.B., *ALDERSON* B., *ROLFE* B., and *PLATT* B., in the later case of *Bristow v. Sequeville*, 5 Ex. Rep. 275.

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JERVIS C. J.—Perhaps as to the degree of knowledge of the law required to render a witness competent, that may depend upon the circumstances of the particular case.

COLERIDGE J.—The witness does not state that she is in any way acquainted with the law of *Scotland*, or able to say what that law is upon the subject of marriage, and the mode in which the question is put to us, namely, whether some one conversant with that law ought not to have been called, assumes that.

Robinson. The prisoner in representing himself by his conduct as a married man, and in representing the ceremony as a marriage, afforded sufficient evidence to justify the jury in coming to the conclusion they did; *Reg. v. Simmonsto*, 1 C. & K. 164. The declaration of the prisoner there that he had been married to his first wife in *New York*, was considered proof of that marriage; here the prisoner's conduct in cohabiting with the woman after the ceremony, amounted in fact to the same thing.

JERVIS C. J.—The question reserved for the consideration of the Court is, whether the evidence given at the trial was sufficient to justify the finding of the jury, and whether some witnesses conversant with the law of *Scotland* should not have been called by the prosecution to say whether the facts given in evidence constituted a valid marriage according to the law of that country. That question does not raise the point as to who is admissible as *peritus*, a point that may be considered settled by the *Sussex Peerage case*(a), or what kind the witnesses called should be. There may be certain cases, perhaps, in which it may not be necessary to have a lawyer to give evidence; but the Court is clearly of opinion that some witness

(a) Namely, that a person not *peritus virtute officii* or *virtute professionis*, is inadmissible to prove the law of a foreign country; overruling *Reg. v. Dent*, 1 Car. & Kir. 97.

conversant with the *Scottish* law of marriage should have been called on the part of the Crown. With regard to the case before us what the witness who was called says—even supposing her a competent witness in such a matter,—does not amount to any proof of a marriage in fact.

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COLERIDGE J., ALDERSON B., CRESSWELL J., and PLATT B., concurred.

REGINA v. HENRY DALE.

1852.

AT the General Quarter Sessions of the peace of our Lady the Queen held at *Alnwick* in the county of *Northumberland* on the twentieth day of *October* in the sixteenth year of the reign of our Sovereign lady *Victoria* of the United Kingdom of *Great Britain* and *Ireland* Queen Defender of the Faith and in the year of our Lord 1852 before her Majesty's justices of the peace assigned to keep the peace of the said county, the following case was agreed upon (that is to say).

At the last *Midsummer* Quarter Sessions, an indictment, of which the following is a copy of the first count, and an extract from the second, was found by the grand jury, to be a true bill,—

“ *Northumberland* (to wit) The jurors for our lady the Queen upon their oaths present that heretofore to wit on the nineteenth day of *May* in the year of our Lord 1851 in the borough of *Tynemouth* in the county of *Northumberland* one *Joseph Gibbon* was convicted before *Alexander Bartleman* and *Solomon Mease* Esquires then and there being two of her

The defendant was indicted for a misdemeanor in having contemptuously and unlawfully neglected and refused to pay over to the treasurer of the county of N., one moiety of a fine imposed under the Alehouse Act, 9 Geo. 4, c. 61, by certain justices of the borough of T., a place which has a commission of the peace, but no grant of separate Quarter Sessions, within 5 & 6 Wm. 4, c. 76, and was found guilty: Held, that the defendant

ant was properly convicted, as penalties under the Alehouse Act, imposed by the justices of a borough so circumstanced, are payable to the treasurer of the county, and not to the treasurer of the borough on account of the borough fund.

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Case.

Majesty's justices assigned to keep the peace in and throughout the said borough in the said county for that he the said *Joseph Gibbon* on the thirteenth day of *May* in the year of our Lord 1851 at the township of *North Shields* in the said borough of *Tynemouth* he the said *Joseph Gibbon* being then and there an ale-housekeeper and duly licensed to sell exciseable liquors by retail in his house and premises there situate did wilfully permit disorderly conduct in his house and premises by then and there suffering persons to the number of twenty and more to remain fighting drinking and making a great noise and disturbance there at a late hour in the night to wit at twelve o'clock at night against the tenor of his said license and contrary to the form of the statute in such case made and provided And the said *Alexander Bartleman* and *Solomon Mease* in and by the said conviction then and there adjudged the said *Joseph Gibbon* for his said offence to forfeit and pay the sum of two pounds ten shillings to be paid and applied according to law and also to pay to *Robert Mitchell*, the complainant the sum of ten shillings for his costs in that behalf And the said *Alexander Bartleman* and *Solomon Mease* did by the said conviction then and there order that if the said several sums were not paid forthwith the same should be levied by distress and sale of the goods and chattels of the said *Joseph Gibbon* and in default of sufficient distress the said *Alexander Bartleman* and *Solomon Mease* did by the said conviction then and there adjudge the said *Joseph Gibbon* to be imprisoned in the house of correction at *Morpeth* in the said county of *Northumberland* there to be kept to hard labour for the space of one calendar month unless the said several sums and all costs and charges of the said distress and of the commitment and conveying of the said *Joseph Gibbon* to the said house of cor-

rection were sooner paid And the jurors aforesaid upon their oath aforesaid do further present that the same *Alexander Bartleman* and *Solomon Mease* did at the time of making the said conviction award one moiety of the said penalty to the use of the said *Robert Mitchell* the said complainant and the prosecutor of the said *Joseph Gibbon* for the said offence And the jurors aforesaid upon their oath aforesaid do further present that the said *Joseph Gibbon* did thereupon afterwards to wit on the day and year first aforesaid pay the said sum of two pounds ten shillings to one *Henry Dale* late of the borough aforesaid in the county aforesaid gentleman and who then was and still is clerk of her Majesty's said justices assigned to keep the peace of our said lady the Queen in for and throughout the said borough and the said sum of two pounds ten shillings was so paid to the said *Henry Dale* and he then received the same as such clerk as aforesaid and for the purpose and in order that it should forthwith be paid by him to the parties to whom the same was to be paid in pursuance of and according to the said conviction and the statutes in such case made and provided to wit one moiety to the said *Robert Mitchell* as such prosecutor as aforesaid and the remainder to the treasurer of the said county And the jurors aforesaid on their oath aforesaid do further present that the justices of our said lady the Queen assigned to keep the peace of our said lady the Queen in and throughout the said borough were at the time of making of the said conviction and thence hitherto have been acting and empowered to act within the said borough by and under a commission of the peace from our lady the Queen (a) which said commission did not nor does

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(a) The commission from the United Kingdom of Great Britain Crown was as follows:—*Victoria*, and *Ireland*, Queen, Defender of by the grace of God, of the the Faith. To our well beloved

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contain any grant of a Court of Quarter Sessions of the peace for the said borough and our said lady the Queen had not then or at any time since granted that a separate Court of Quarter Sessions of the peace should be holden in and for the said borough nor were there then or at any other time any separate General or Quarter Sessions of the peace holden in or for the same And the jurors aforesaid on their oath aforesaid do further present that after the said sum of two pounds ten shillings was so paid to the said *Henry Dale* as aforesaid it became and was his duty to pay one moiety of the said sum of two pounds ten shillings to one *William Fenwick Blackett* Esquire who at the time of the making of the said

and faithful the Mayor of our borough of *Tynemouth*, and the Mayor of our said borough for the time being, *William Linskell* Esquire, *Robert Pow*, chain manufacturer, *Solomon Mease*, ship-owner, *Alexander Bartleman*, brewer, *John Coppen*, Esquire, *Mathew Popplewell*, surveyor of shipping, *John Dale*, shipowner, *Thomas Barker*, ship builder, *Joseph Shaker*, coal owner, *John Dryden*, shipowner, *Emanuel Young*, ship builder, and *Michael Spencer*, tobacco manufacturer, Greeting—

Know ye that we have assigned you and every of you jointly and severally our justices to keep our peace in and throughout our borough of *Tynemouth* and to keep and cause to be kept ordinances and statutes made for the good of our peace and for the conservation of the same, and for the quiet rule and government of our people in all and every the articles thereof in the said borough according to the form and effect of the same, and to chastise and punish all persons that offend against the form of those ordinances and statutes, and

to cause to come before you, or any one of you all those who to any one or more of our people concerning their bodies or the firing of their houses have used threats to find sufficient security for the peace, or their good behaviour towards us and our people, and if they shall refuse to find such security then them in our prisons until they shall find such security to cause to be safely kept.

And therefore we command you that you diligently apply yourselves to the keeping our peace ordinances and statutes, and all and singular other premises and purposes and fulfil the same in form aforesaid doing therein what to justice appertaineth according to the laws and customs of *England*.

In witness whereof we have caused these our letters to be made patent.

Witness ourself at *Westminster* the twenty-sixth day of *March*, in the thirteenth year of our reign.

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conviction was and from thence hitherto hath been and still is treasurer of the said county of *Northumberland* according to law and to the statutes in that case made and provided. And the jurors aforesaid upon their oath aforesaid do further present that the said *Henry Dale* well knowing the premises although a reasonable time for his paying the said moiety of the said sum of two pounds ten shillings to the said treasurer had elapsed long before the day of taking of this inquisition and although the said treasurer hath at all times been ready and willing to receive and give him a receipt for the same hath yet hitherto unlawfully and contemptuously neglected and refused to pay and still neglects and refuses to pay the said moiety of the said sum of two pounds ten shillings or any part thereof to the said treasurer and he wrongfully and unlawfully detains the same and every part thereof from him contrary to his duty in that behalf against the form of the statutes in that case made and provided and against the peace of our lady the Queen her Crown and dignity."

There was a second count in the indictment the same as the first word for word, with this addition, "And the jurors aforesaid upon their oath aforesaid do further present that the said *Alexander Bartleman* and *Solomon Mease* in the making of the said conviction acted as such justices aforesaid for the said county."

The usual process for that purpose having been issued, the defendant entered into a recognizance to appear at the next Quarter Sessions to try and answer the said indictment.

At the *Michaelmas* Quarter Sessions held 20th *October*, 1852, the said indictment was tried, and the jury found the defendant guilty.

Whether the defendant is guilty or not guilty de-

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pends upon the construction which may be put upon the public acts of Parliament relating to this question, and which formed part of this case.

The 26th section of 9 *Geo. 4*, c. 61 (the Alehouse Act), enacts, "That it shall be lawful for any justice before whom any penalty shall be recovered under the provisions of this act, to award, if he shall think fit, any portion of the same not in any case exceeding one moiety thereof to the use of the prosecutor, and the remainder to the treasurer of the county or place for which such justice shall then act, and the said treasurer shall place the same to the credit of such county or place, and shall duly account for the same."

By section 33 of the Alehouse License Act, it is enacted, "That every justice before whom any such conviction shall have been made shall return the same, or cause it to be returned to the General or Quarter Sessions of the peace holden for the county or place wherein the offence shall have been committed, and it shall then and there be delivered to the clerk of the peace, or other person acting as such, to be by him filed or enrolled amongst the records of the said Court, and the certificate of the clerk of the peace of such conviction, which he is hereby required to grant on demand upon payment of a fee of one shilling, shall be legal evidence of every such conviction.

By section 37 (interpretation clause) reciting, "and in order to remove certain doubts as to the meaning of certain words in the act, be it enacted, that the word 'justice' shall be deemed to mean justice of the peace, and that the words 'treasurer of the county or place' shall be deemed to include any officer acting in such capacity or charged with the receipt and expenditure of monies from and out of which the cost of public prosecutions have been usually defrayed, and the words 'clerk of justices' shall be deemed to include any person acting at such, and the words

'county or place' shall be deemed severally to include any county, riding, division of the county of *Lincoln* hundred, division of a county, liberty, division of a liberty, county of a city, county of a town, city, cinque port or town corporate, and the words 'division or place' shall be deemed to include any division of a county or riding, liberty, division of a liberty, county of a city, county of a town, city, cinque port, or town corporate."

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By the 126th section of 5 & 6 *Wm. 4*, c. 76, an act to provide for the regulation of municipal corporations in *England* and *Wales*, passed 9th *September*, 1835, it is enacted, "that when by any act any penalties or forfeitures are or shall be hereafter made recoverable in a summary manner before any justice or justices of the peace, and by such act respectively, the same are or shall be limited and made payable to his Majesty, or to any body corporate, or to any person whomsoever, save and except the informer, who shall sue for the same, or any party aggrieved, in every such case the same if recovered and adjudged before any justice of any borough, in which a separate Court of Quarter Sessions of the peace shall be holden as aforesaid, shall notwithstanding anything in such act respectively contained be recovered for and adjudged to be paid to the treasurer of such borough for the time being, to the credit and on account of the borough fund of such borough, and no such penalty or forfeiture or share of such penalty or forfeiture shall in any case be recovered by or adjudged to be paid to any other persons than the said treasurer, unless such person be the informer or the party aggrieved."

By section 31 of 11 & 12 *Vict. c. 43*, it is enacted, "that in every warrant of distress to be issued as aforesaid, the constable or other person to whom the same shall be directed, shall be thereby ordered to

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pay the amount of the sum to be levied thereunder unto the clerk of the division in which the justice or justices issuing such warrant shall usually act, and if any person convicted of any penalty or ordered by a justice or justices of the peace to pay any sum of money shall pay the same to any constable or other person, such constable or other person shall forthwith pay the same to such clerk ; and if any person committed to prison upon any conviction or order as aforesaid, for nonpayment of any penalty, or of any sum thereby ordered to be paid, shall desire to pay the same and costs before the expiration of the time for which he shall be so ordered to be imprisoned by the warrant for his commitment, he shall pay the same to the gaoler or keeper of the prison in which he shall be so imprisoned, and such gaoler or keeper shall forthwith pay the same to the said clerk, and all sums so received by the said clerk shall forthwith be paid by him to the party or parties to whom the same respectively are to be paid, according to the directions of the statute on which the information or complaint in that behalf shall have been framed ; and if such statute shall contain no such directions for the payment thereof to any person or persons, then such clerk shall pay the same to the treasurer of the county, riding, division, liberty, city, borough, or place, for which such justice or justices shall have acted, and for which such treasurer shall give him a receipt without stamp ; and every such clerk, and every such gaoler or keeper of a prison, shall keep a true and exact account of all such monies received by him, of whom and when received, and to whom and when paid, in the form (T) in the schedule to this act annexed, or to the like effect ; and shall once in every month render a fair copy of every such account unto the justices who shall be assembled at the petty sessions for the division in which such justice or justices shall usually act, to be holden on or next after

the first day of every month, under the penalty of forty shillings, to be recovered by distress in manner aforesaid, and the said clerk shall send or deliver every return so made by him as aforesaid to the clerk of the peace for the county, riding, division, liberty, city, borough, or place within which such division shall be situate, at such times as the Court of Quarter Sessions for the same shall order in that behalf."

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The borough of *Tynemouth* was incorporated by royal charter, dated 6th *August*, in the year of our Lord one thousand eight hundred and forty-nine, and a commission of the peace was granted to certain persons therein named, dated 26th *March*, in the year of our Lord one thousand eight hundred and fifty, but no Court of Quarter Sessions was thereby granted.

It is admitted for the purposes of this case that the defendant has paid over the moiety of the said fine to the treasurer of the borough of *Tynemouth*.

Upon this, counsel for the defendant moved in arrest of judgment, contending that upon the true construction of the statutes he had duly discharged himself by paying over the money to the treasurer of the borough of *Tynemouth*.

On the other hand counsel for the prosecution contended that he had not discharged himself as it was his duty to pay the moiety of the said fine to the treasurer of the county of *Northumberland*, the borough of *Tynemouth* being part and parcel of the county and there being no grant of a Court of Quarter Sessions to that borough.

Accordingly no judgment was passed, and the Court postponed all further proceedings to the next sessions and granted a case (a) for the opinion of the

(a) The above case was signed ; —*Chas. A. H. Monck*, Chairman of Quarter Sessions for *Northumberland* : *Wm. Dickson*, Clerk of the

Peace for the county of *Northumberland* : *Charles Otter* for the prosecution : *Adolphus F. O. Liddell* for the defendant.

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justices of either bench or the Barons of the Exchequer under the statute. The defendant being discharged on recognizance of bail to appear and receive judgment at the next Quarter Sessions.

The question for the opinion of the Court is, whether the defendant was properly found guilty upon the indictment for neglecting and refusing to pay over one moiety of the said fine to the treasurer of the said county of *Northumberland*.

On the 13th November, A.D. 1852, this case was argued before JERVIS C. J., ALDERSON B., COLERIDGE J., CRESSWELL J., and MARTIN B.

Otter, for the Crown.

Pashley Q. C., and *A. Liddell*, for the defendant.

Pashley Q. C. The question for the consideration of the Court is simply, whether the moiety of a fine imposed by justices of the borough of *Tynemouth*, for a violation of the provisions of the Alehouse Act, is payable to the treasurer of the borough on account of the borough fund, or ought to have been paid over to the treasurer of the county of *Northumberland* in which the borough of *Tynemouth* is situate. Under the words of the act of Parliament, it appears that the penalty is to be paid to the treasurer of the *place* in and for which the justices by whom it was imposed were acting. The 4th section of 9 Geo. 4, c. 61, enacts "That the justices assembled at the General or Quarter Sessions, which shall be holden at *Michaelmas* next after the passing of this act, and at the general licensing meeting in every subsequent year shall appoint not less than four, nor more than eight special sessions to be holden in the division or *place* for which each such meeting shall be holden." The word "place," it is manifest, includes such a borough as *Tynemouth*; the 7th section of 9 Geo. 4,

c. 61, settles the matter. It empowers *county justices* to attend and act at the meeting holden for a corporate or inferior jurisdiction where there not are two justices present who are legally competent to act ; the words of the section being:—"that whenever at any of the meetings to be holden as aforesaid for any liberty, county of a city, county of a town, city or town corporate, there shall not be present at least two justices acting in and for such liberty, county of a city, county of a town, city or *town corporate*, who are not disqualified, it shall be lawful for the justices acting in and for the county or counties adjoining to such liberty, county of a city, county of a town, city or *town corporate*, and not disqualified from acting, to act within such liberty or place."

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COLERIDGE J.—“Town corporate” means a city or town having exclusive jurisdiction.

Pashley Q. C. The act of Parliament seems to have confined it to a divisional district. There are many boroughs such as *Bradford*, *Sheffield*, and other places, where the county sessions are held ; the expenses of prosecutions are paid out of the county rate, and the boroughs contribute to the county rate.

PLATT B.—The inhabitants of *Tynemouth* pay to the county rate as any other of the inhabitants of the county of *Northumberland*. Surely the fine should be paid to the fund out of which the expenses of the county are defrayed.

Pashley Q. C. The manner in which penalties under the Alehouse Act are to be applied is directed by section 26 of 9 *Geo. 4*, c. 61. “It shall be lawful for any justice before whom any penalty shall be recovered under the provisions of this act, to award, if he shall think fit, any portion of the same not in any case exceeding one moiety thereof to the use of the prosecutor, and the remainder to the treasurer of the

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county or place for which such justice shall then act ; and the treasurer shall place the same to the credit of such county or place, and shall duly account for the same." Now what can the words "*place for which such justice shall then act*" mean ? It is submitted that the fine is payable to the treasurer of the borough of *Tynemouth* in which the justices were acting when the penalty was imposed, according to 5 & 6 Wm. 4, c. 76, s. 126.

Otter. The word "place" used in the Alehouse Act, means a place which has a grant of separate Quarter Sessions. Penalties payable to the treasurer of a borough under 5 & 6 Wm. 4, c. 76, s. 126, are penalties "recovered and adjudged before any justice of any borough in which a separate Court of Quarter Sessions shall be holden." In the interpretation clause 9 Geo. 4, c. 61, the words "treasurer of the county or place," it is declared, shall be deemed to include any officer acting in such capacity, or charged with the receipt and expenditure of monies from and out of which the cost of public prosecutions have been usually defrayed." Now the treasurer of the borough of *Tynemouth* is not charged with the cost of public prosecutions, but the treasurer for the county of *Northumberland* is the party so charged. It is manifest, therefore, that the 26th section of 9 Geo. 4, c. 61, directs the payment of penalties under the act to the latter instead of the former. "Place" clearly means a place with a borough fund, out of which the expenses of prosecutions are defrayed ; in other words, a borough having a grant of separate Quarter Sessions, which it is admitted the borough of *Tynemouth* has not.

ALDERSON B.—"County or place" means county, *alias* place.

JERVIS C. J.—In the same way we have the words "division or place."

ALDERSON B.—It looks as if the Legislature intended that the inhabitants of the borough should contribute to the fund that bears the public expenses.

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Otter cited *Rex v. Amos*, 2 B. & Ald. 533; *Reg. v. Wells*, 11 Q. B. 758; and *Rex v. Sainsbury*, 4 T. R. 451.

Pashley Q. C., in reply, relied upon the fourth and seventh sections of 9 Geo. 4, c. 61.

Cur. adv. vult.

Chancery Mark
On the 22nd of January, A. D. 1853, the following judgment was read by

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JERVIS C. J. (a)—Whether the defendant is guilty or not guilty in this case depends upon the construction of the 9 Geo. 4, c. 61, and we are of opinion that upon the proper construction of that statute the defendant is guilty, and was properly convicted.

The penalty, for the nonpayment of which to the treasurer of the county of *Northumberland* the defendant has been convicted, was in this case imposed under the Alehouse Act (9 Geo. 4, c. 61) by justices acting for the borough of *Tynemouth*, which has a commission of the peace, but no Court of Quarter Sessions, and the question is whether the penalty ought to be paid to the treasurer of the county, or to the treasurer of the borough on account of borough fund.

By the 26th section of the Alehouse Act, so much of the penalty as is not awarded to the prosecutor, is to be paid to the treasurer of "the county or place," for which the justice was acting when the penalty was imposed. The defendant's counsel contends that the word "place" must be understood in its ordinary sense, and that inasmuch as the justices were acting for the borough of *Tynemouth* when the penalty was

(a) The other Judges present were **POLLOCK C. B.**, **PARKE B.**, **WILLIAMS J.**, and **TALFOURD J.**

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imposed, the treasurer of that borough is the person who ought to receive the penalty, and that it ought to be applied to the borough fund, under the provisions of the stat. 5 & 6 Wm. 4, c. 76, s. 126. On the other hand, the prosecutor asserts that the word "place," as used in that section, means a place for which a Court of Quarter Sessions is held. This, we think, is the right construction. In many of the sections in which the words "county or place" are used, it is manifest that the latter word applies only to places where Quarter Sessions are held. For instance, by the 27th section, parties aggrieved may appeal to the next General or Quarter Sessions of the peace of the "county or place" wherein the cause of complaint arose; and by the 33rd section, the conviction is to be returned to the next General or Quarter Sessions of the peace of the "county or place" wherein the offence shall have been committed. The interpretation clause shews further, that it was intended that these penalties should be applied towards the costs of public prosecutions and not to a borough fund, because it explains the words treasurer of a "county or place," to mean an officer acting in such capacity or charged with the receipt and expenditure of monies from and out of which the costs of public prosecutions have been usually defrayed. The person to receive the penalty, is to be an officer acting in the capacity of treasurer of monies, for and out of which the cost of public prosecutions have been usually defrayed. In the same spirit the justices in Quarter Sessions are, by the 29th section, authorized to indemnify the justices from their costs upon an appeal in certain cases, and to order the treasurer of the "county or place" in and for which the justice acted to pay the amount. At the time the Alehouse Act passed, corporations had private property but no borough fund,

properly so called, over which the Legislature could with justice exercise a control. The treasurer of the place, meant in this section, must clearly be the treasurer of a place having a Court of Quarter Sessions, an officer under the control of the justice making the order, with a fund under their control. It would be strange that the same words should give to one fund, the borough fund, all the penalties for good convictions, and charge upon another fund, the county rate, all the costs for convictions which could not be sustained.

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For these reasons we think the conviction right (a).

(a) The Editor is indebted to Lordship's MS. of the above judgment.
Lord Chief Justice JERVIS for his

REGINA v. ETIENNE BARRONET AND EDMOND ALLAIN.

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THIS was an application to the Queen's Bench for a writ of *habeas corpus* to bring up the bodies of the prisoners, and for a writ of *certiorari* to bring up the depositions taken before the coroner and the magistrates on which they had been committed to the gaol of the county of *Surrey* to await their trial on a charge of *wilful murder*, in order that they should be admitted to bail.

Montagu Chambers Q. C., and *Parry*, for the prisoners.

duel in which one *C.* met his death: *Held*, that the circumstances that the duel was a fair one, and that the prisoners and other persons concerned in the duel were foreigners, ignorant of the fact that by the law of *England* killing an adversary in a fair duel, amounted to murder, formed no ground for admitting the accused to bail.

Held also, that although the Court of Queen's Bench, as the sovereign Court of criminal jurisdiction has in all cases the power to admit to bail, yet that in its discretion where the crime is of high nature, the evidence clear, and the punishment heavy, it will not admit persons committed for such an offence to bail.

The prisoners were committed by the warrant of the coroner of *S.* and also by warrant of justices of that county on a charge of wilful murder, they having on their own confession acted as seconds in a

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On the 3rd November, A.D. 1852, Lord CAMPBELL C. J., COLERIDGE J., WIGHTMAN J., and ERLE J., being the Judges present, *M. Chambers* Q. C. appeared in support of his application. He moved on affidavits, from which it appeared that *Frederic Courmet*, a *French* naval officer, had been killed in a duel by some one not in custody, and that the prisoners *Etienne Barronet* and *Edmond Allain* had acted as seconds to the deceased. A coroner's inquisition was taken by the coroner for the county of *Surrey* upon the body of *Frederic Courmet*, and the jury having found a verdict of wilful murder against the prisoners, they were committed upon the coroner's warrant on that charge. The case underwent investigation before certain justices of the peace for the county of *Surrey*, and the prisoners were also committed by the justices to take their trial for the wilful murder of *Frederic Courmet*. While before the committing justices the prisoners admitted that they had acted as the seconds of the deceased in the duel in which he met his death. The affidavits of the prisoners further stated that they were natives of *France*, that they were ignorant of the laws of *England*, and of the circumstance that acting as seconds in fair duel was punishable as a crime in this country, it not being punishable as a crime in *France*: also that there was perfect fairness in the conduct of all the parties to the duel; that the prisoner *Barronet* had made endeavours to prevent the duel, and that both *Barronet* and *Allain* had rendered every possible assistance and attention to the deceased after he had received the wound from which he subsequently died. The prisoners, moreover, pledged their oaths that if admitted to bail they would duly await their trial, and surrender themselves when required. An application had been made during the vacation to CROMPTON J.,

but that learned Judge, not having the whole of the facts before him, without expressing any opinion as to the merits of the application, declined to act in the case without an opportunity of consulting the other Judges of the Court; and therefore the application was now made to the full Court. The depositions taken before the coroner and the magistrates bore out the statement in the affidavits of the prisoners, that the duel was a fair one.

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Lord CAMPBELL C. J.—Your argument is, that bail may be taken because the duel was a *fair* one: surely this is the first time that a Court of law has been called on to interfere on any such ground.

M. Chambers Q. C. hoped to satisfy the Court as to the propriety of his motion.

Lord CAMPBELL C. J.—Do you mean to contend for the proposition, that if a fair duel takes place, and death ensues, that it is not murder by the law of *England*?

M. Chambers Q. C. said no; but there were circumstances in this case which entitled him to make the application. He then called the attention of the Court to a statement which had been made by *Baronnet*, and joined in by *Allain*, before the justices of *Surrey*, to the effect that they had acted as *Courmet's* seconds from motives of private friendship and in obedience to the rules of honour, and that it was inconsistent with their honour to name the adversary of *M. Courmet*; also to affidavits, from which it appeared that *Baronnet* was a *French* merchant, carrying on business at *Paris* until the *coup d'état*, when he found it necessary to leave *France* and become a voluntary exile in this country, and that *Allain*, who was a wine and spirit merchant, had become an exile under the same circumstances. Both the prisoners stated that they had never been charged with any offence in their own

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country, except with that for which they were banished. They added that they were involuntary refugees, and that if they should be liberated on bail it would be unsafe for them to abscond, as there was no other country than *England* in which they could be safe. The learned counsel having put these facts before the Court, adverted to the principle which regulated the admission of parties to bail. The Court was the protector of those who took refuge here, and lived under the laws of this country. It was unknown to the policy and humanity of the laws of *England* that before trial the liberty of any one should be taken away, except as a matter of necessity, for the purpose of preventing a defeat of justice; the only object of imprisonment before trial being to secure the appearance of the party to take his trial. There was a recent case in which the principle he mentioned had been acted on, and where persons who were charged with a felony had been admitted to bail. In *Reg. v. Scaife*, 9 Dowl. P. C.553, this principle was stated by COLERIDGE J.:—"I conceive that the principle on which parties are committed to prison by magistrates, previous to trial, is for the purpose of ensuring the certainty of their appearing to take their trial. It seems to me that the same principle is to be adopted on an application for bailing a person committed to take his trial, and it is not a question as to the guilt or innocence of the prisoner. It is on that account alone that it becomes necessary to see whether the offence is serious, whether the evidence is strong, and whether the punishment for the offence is heavy." More recently the Court of Queen's Bench in *Ireland* granted a rule for admitting the soldiers of the 31st regiment, concerned in the *Six Mile Bridge* affray, to bail, although committed on a charge of wilful murder on a coroner's inquisition.

Lord CAMPBELL C. J.—Did the parties there acknowledge that they were guilty of the crime laid to their charge? 1852.
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M. Chambers Q. C. It might be admitted that there was a distinction between the *Six Mile Bridge* case and the present; but a confession of guilt could not affect the question, the object being to secure the appearance of the parties accused to take their trial. The Court would not anticipate the punishment that might follow conviction ; perhaps it might not be a heavy one ; under the circumstances it would most probably be a lenient one.

Lord CAMPBELL C. J.—This Court can only look at the law ; it cannot take into consideration the question whether the punishment annexed by law to an offence will be carried into execution or not, nor anticipate the mercy which the Crown may be pleased to exercise. Here the crime of murder is charged and confessed.

M. Chambers Q. C. The law, no doubt, was that duelling was a crime, and that killing an adversary in a duel was murder. The Court could not alter the law, but, where the letter of the law was strict and severe, the Judges, in administering it, would temper its severity in accordance with the state of feeling, and even the prejudices and infirmities of society. In the *Annual Register* for the year 1782, the case of the Rev. Mr. *Allen* is mentioned, where it was clear that the prisoner had been at first committed for trial, and that he afterwards surrendered to take his trial, the latter fact shewing that he must in the meantime have been admitted to bail. Mr. *Allen*, being a clergyman, had killed a man in a duel; he was found guilty of manslaughter and fined a shilling. The same spirit had been shewn in various cases, where the rank of the parties led to the impression that they had acted,

1852. however wrongly, in accordance with the feelings of the class of society to which they belonged. There were the duels between the Duke of *York* and Colonel *Lennox*, between Lord *Norfolk* and Lord *Maldon*, between Mr. *Adam* and Mr. *Fox*, between Lord *Lonsdale* and Captain *Duff*, between Mr. *Tierney* and Mr. *Pitt*, and between Mr. *Adolphus* and Mr. *Alley*. In such cases it was rare to keep the persons in prison till time of trial, and rarer still, except there had been unfairness in the duel, had the sentence according to the law been carried into effect. On these grounds, inasmuch as it appeared that the duel in the present instance was a fair one, and that the prisoners, if admitted to bail, were likely to surrender in due course and take their trial, he submitted that the Court would grant the writs of *habeas corpus* and *certiorari*, for the purpose of admitting the prisoners to bail.

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Lord CAMPBELL C. J.—I am of opinion that no ground has been laid before the Court to justify us in yielding to the present application. For obvious reasons, I shall abstain as much as possible from observing on the circumstances of the case; but after what has been said on the subject generally, I consider it my duty to make some few observations. These two persons are placed in exactly the same situation as if they were native born subjects of this kingdom, and will have the same justice administered to them as would be administered to native born subjects. I am firmly convinced that if any person in the highest station in the realm had been charged by the verdict of a coroner's jury with the crime of murder, and had confessed that he was an accessory in the duel with the deceased in respect of which that verdict had been obtained, there is not any tribunal in this country that would allow him to go at large before trial. The

Court has to see, as it had been stated in a most forcible manner by COLERIDGE J. in the case cited, the nature of the charge, the evidence adduced in support of that charge, and the punishment. The Court has to consider the seriousness of the charge ; it is murder :—the nature of the evidence ; there is the confession of the prisoners :—the punishment awarded by the law ; death. Under these circumstances can it be supposed that the Court will try, by a preliminary investigation, whether this duel was a fair one or otherwise ? The attempt to do this would be attended with the most injurious consequences, and might be most prejudicial to the interests of a prisoner himself. The Court can only look to the case before it. Here is a legal charge, which, on the confession of the accused, must be taken to be established. Is it after that to be said that, under these circumstances, when the confession has been given in evidence, and when, on all the facts before them the jurors have given a verdict of guilty, that the sentence of the law will not be pronounced ? I hope circumstances may appear so that the execution of the sentence may be avoided, but the sentence of death must necessarily be pronounced. The Judges of this Court cannot, at this moment, consider whether there were any circumstances of mitigation, and act as if they were advising the Crown with respect to carrying the sentence into effect. There has been no case cited by Mr. *Chambers* as a precedent for this application. The case in the *Annual Register* cannot be viewed as an authority. The Court cannot know, from the vague statement there, what the charge was, nor what was the form of the finding of the coroner's jury, nor whether the charge found was murder or manslaughter. Indeed it is not clear that Mr. *Allen* was bailed at all, or he may have been admitted to bail by a justice of the peace ignorant of his duty. Nor can the *Irish* case men-

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1852. tioned be considered as one in point. There the coroner's jury had found a verdict said to be contrary to all the evidence, and the parties accused of wilful murder, instead of admitting their guilt, protested their innocence, and gave evidence to shew that they had only acted in self-defence. I am, therefore, of opinion that these gentlemen must remain in prison. Persons who fly to this country as an asylum must obey the laws of the country, and be content to place themselves in the same situation as native born subjects. In their trial the prisoners will have every advantage given to foreigners; they can, if they desire it, have a jury *de medietate linguae*; and they will have the benefit of the ablest counsel. But if they are found guilty sentence of death must be passed upon them, and they must then apply to the mercy of the Crown, before which the circumstances brought before us to-day will then properly be laid.

COLERIDGE J.—I am also of opinion that this application must be refused. Even if the rule were granted, and the facts now stated on behalf of the prisoners remained unanswered, this Court would still be bound to remand the accused to prison. With regard to what I said in *Reg. v. Scaife* (a), to that judgment I still adhere. An accused person is not committed for trial on the ground of present guilt, but because there is reasonable ground for presuming him to be guilty. This Court has, indeed, an unlimited right in all cases to bail the accused; and magistrates, since the 5 & 6 Wm. 4, c. 33 (b), have had the right to bail in felony even "notwithstanding such person or persons shall have confessed the matter laid to his or their charge, or not-

(a) 9 Dow. P. C. 553.

(b) The stat. 5 & 6 Wm. 4, c. 33, was passed to amend 6 Geo. 4, c. 64; the preamble recites: Where-as in many cases the taking of bail

for the appearance of persons charged with felony may be safely admitted without endangering the appearance of such persons to take their trial in due course of law, and

withstanding such justices shall not think such charge is groundless, or shall not think that the circumstances are such as to raise a presumption of guilt." After such an enactment it is impossible to say that the guilt of parties alone would justify a refusal of bail. Yet it is an important element in the consideration of the question. The three circumstances generally speaking to be considered, are, the nature of the charge, the evidence, and the punishment. Here there is a charge of wilful murder, a confession before the magistrates, and the punishment is by the law a capital punishment. On these grounds there is a probability that no amount of bail will secure the prisoners' attendance to take their trial. Two observations only are made in answer, that these persons are foreigners, and that if they are found guilty the sentence of the law will never be carried into effect. We are told to lay down a different rule to what we should apply to native born subjects, because these persons are foreigners and ignorant of our law relating to duelling. But I agree with the Lord Chief Justice, that foreigners who come to England, must in this respect be dealt with in the same way as native subjects. Ignorance of the law cannot, in the case of a native, be received as an excuse for a crime, nor can it any more be urged in favour of a foreigner. With respect to the punishment which might be inflicted in this case, in the event of the conviction of the prisoners, we must assume that the punishment awarded to the crime by law will follow a verdict of guilty. It is not

it is therefore expedient in such cases to amend and the provisions in that respect, &c.

The section of the statute referred to by Mr. Justice COLE-RIDGE, is repealed by 11 & 12 Vict. c. 42, s. 34. The 23rd section of the last-mentioned act provides that where any person shall be brought before any justice charged

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with any felony [or with &c.] such justice of the peace may in his discretion, admit such person to bail upon his procuring and producing such surety or sureties as in the opinion of such justice will be sufficient to ensure the appearance of such deceased person at the time and place when and where he is to be tried for the offence.

1852. for this Court to speculate as to the manner in which the mercy of the Crown may be exercised.

BARRONET'S Case. WIGHTMAN J.—I fully concur in the observations of my brother COLERIDGE; and think that this is not a case for the interference of the Court.

ERLE J.—It appears to me also to be the duty of the Court to refuse this application. Wherever the crime is of great magnitude, the punishment of a high nature, and the evidence of crime clear, then an application of this sort ought, in my judgment, to be refused; but if any one of these requisites be wanting, the Court will exercise its discretion in the matter. To make a difference in the case of foreigners would be a most dangerous practice. It is of great importance that the administration of the law should be uniform. It must be administered without respect to persons, and it would be dangerous and unjust to introduce into a general rule an exception in favour of foreigners.

The rule was accordingly refused.

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10 Nov 36 1852. 695. 406 N. 80
REGINA v. EMANUEL BARTHELEMY AND
PHILIPPE EUGENE MORNEY.

1. As to the principle upon which bail is refused or granted in cases of murder and capital offences. See *Reg. v. Barronet, ante,* p. 51.

2. In

On the 23rd November, 1852, Huddleston moved the Queen's Bench for a writ of *habeas corpus* to bring up the bodies of *Emanuel Barthelemy* and *Philippe Eugene Morney*, and also for a writ of *certiorari* to remove the depositions taken before the coroner for *Surrey*, and the magistrates of that county (*a*), with a view to their being admitted to bail. The parties he said had

(*a*) See *Reg. v. Barronet, and Allain, ante* p. 51.

moving for a *certiorari* to bring up depositions taken before a coroner or magistrates, with a view to admitting a party committed upon them for trial on a charge of murder or manslaughter, it is the proper course to produce *copies* of such depositions verified by affidavit, and on them to ground the application.

been committed on the coroner's inquisition, and also by the magistrates, upon a charge of wilful murder. They were two of four gentlemen who were alleged to be concerned in a fatal duel which took place near *Egham*, in the county of *Surrey*. A similar application had been made, in the early part of the Term, on the part of two of the parties. It was refused by the Queen's Bench; but this case was distinguishable. In that case the parties had confessed their guilt, and the Court said that where the offence was serious, the punishment capital, and the evidence clear, that bail would not be allowed; and whether there was a confession or no, was always an important consideration in such cases. *Coke*, 4 Inst. 178, says, "If upon examination a man confesseth a felony, if the *mittimus* be for felony confessed, he cannot be bailed." But in the present case the prisoners have made no confession.

COLERIDGE J.—Have they made an affidavit denying their guilt?

Huddleston. That would not be according to usual practice. There are precedents to support the present application. In the year 1843, Mr. *Gulliver*, who appeared to have been a surgeon attending on the ground at the duel in which Colonel *Fawcett* was killed, was admitted to bail by **COLERIDGE J.** He afterwards surrendered, was tried and acquitted. The Earl of *Cardigan*, after wounding his antagonist in a duel, avowed the fact before a magistrate, but was admitted to bail by him; and after an indictment for shooting with intent to kill was found against that noble lord, **BOSANQUET J.** enlarged the recognizances both of his lordship and of his second. In *Rex v. Morgan*, 1 Bulst. 84, which was an indictment for murder in a duel, the prisoner was admitted to bail.

Lord CAMPBELL C. J.—I do not think it has ever been doubted that the Court may in its discretion bail

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BARTHELEMY'S Case.

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in cases of murder (*a*). In the case of *Rex v. Morgan*, the Court seem to have thought that there was improper delay on the part of the prosecutor :—what are the facts in the present case ?

Huddleston. Lord *Mansfield*, in the case of *Rex v. Lord Baltimore*, 1 W. Bk. 648, strongly disapproved of discussing under similar circumstances the nature of the evidence. To do so might be very prejudicial to the prisoners.

Lord *CAMPBELL C. J.*—But grounds must be shewn before a prisoner can be admitted to bail.

COLERIDGE J.—The uniform practice on applications for the writ of *certiorari*, in such cases, is to produce copies of the depositions verified by affidavit, and on them to found the application.

Huddleston, then, having argued from copies of the depositions, that the evidence against the defendants was far from being conclusive, contended that the case was one in which the parties were entitled to be liberated on giving substantial bail for their appearance to take their trial.

Cur. adv. vult.

(a) See the letter of *Junius* to Lord *Mansfield C. J.* respecting the case of *John Eyre*, in which, with much acumen and learning, he reviews the various statutes respecting bail from stat. *Westminster I.* to the *Habeas Corpus Act*, 33 Car. 2, and cites the principal authorities on the subject. *Letters of Junius*, lxviii. The law upon the subject as to the power of the Court of Queen's Bench, and the mode in which that Court exercises the discretion vested in Judges by the law is well expressed by *Hawkins*:—"It cannot be doubted but that notwithstanding neither the Judges of this, nor of any other superior Court of justice are strictly within the purview of that statute (stat. *West.* 1. c. 15), yet they will always, in their dis-

cretion, pay a due regard to the rules prescribed by it, and not admit a person to bail who is expressly declared by it to be irrepleivable without some particular circumstance in his favour. It seems difficult to find an instance where persons attainted of felony, or convicted thereof by verdict general or special, or notoriously guilty of treason or manslaughter, &c. by their own confession or otherwise, have been admitted to bail without some special motive to induce the Court to grant it." 2 Hawk. P. C. c. 15. And see 2 Inst. 185; 2 Hale, 129, 148; Salkeld, 61; Keylengen, 90; Lord Raym. 381; 5 Mod. 454.

The discretion of the Court, Coke (4 Inst. 91) defines to be discernere per legem quid sit justum.

On the 24th November, the judgment of the Court was delivered by Lord CAMPBELL C. J.—

Having carefully looked at the depositions taken before the magistrates and the coroner, the Court is of opinion that it would not be justified in yielding to the application. Here there is an inquisition finding the parties guilty of wilful murder. On looking at the depositions, we find that the death took place in a duel, and the Court is of opinion that there is evidence to support the finding of the coroner's jury. We do not say that the evidence was conclusive; on the contrary, we say, as in the previous case, "God grant them a good deliverance!" The parties are in the situation of persons against whom a grand jury have found a verdict of wilful murder. It is unnecessary to consider what course the Court would pursue if there had been no evidence, for in this case there is evidence. It would therefore be contrary to all the principles upon which the Court has uniformly acted if it were to grant a writ of *habeas corpus*. There is, in this instance, no distinction between the case where murder takes place in a duel and in any other transaction, and it would be inexpedient that there should be. Time was when public opinion was contrary to the law of the land, but it has now taken a turn, and is more in accordance with it, and I trust that the time will soon arrive when duelling will be considered not only as illegal, but as absurd. The application must be refused (a).

(a) As to bail in cases of felony generally, see *Mirror*, chap. ii. s. 10, *Sir E. Coke's Treatise on Bail and Mainprize*; 4 Inst. 178, cap. 31; *Justices of Peace*; *Hale's Sum. P. C.* 96; *Com. Dig. tit. Bail*; 4 *Bla. Com.* 297; 2 *Hawk. P. C.* 15; 1 *Chitty Crim. L.* 99; *Eighth Rep. Commissioners on Crim. L.* 49; and as to practice under 11 & 12 *Vict. c.* 42, in admitting to bail where parties are committed to

prison by a justice on the charge of manslaughter or murder, see *Arch. Crim. Pl. Ev. and Practice*, 12th ed. by *Welsby*, p. 72; and in cases where a prisoner is committed on the warrant of a coroner, see *Ib. tit. "Coroner's Inquisition,"* p. 101.

As to the writ of *Habeas Corpus* generally, see *Eighth Rep. of Commissioners of Crim. L.* chap. xi. Sect. 2, p. 190.

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WILLIAM DUGDALE v. THE QUEEN.

1. Certain counts in an indictment charged the defendant with preserving and keeping in his possession obscene prints with the intent and for the purpose of unlawfully uttering and selling the same, and thereby corrupting the morals of the liege subjects of the Queen : Held, upon writ of error, insufficient in law.

2. But Held, that the counts in the indictment charging that the defendant did unlawfully obtain and procure obscene prints with a like intent, and for a similar purpose, were good, and charged a misdemeanor punishable at common law.

WRIT of error in the Queen's Bench. The defendant was tried before Mr. Serjt. Adams at the Westminster sessions, on the 24th *September*, 1851, upon indictment charging him with unlawfully preserving and keeping certain lewd and obscene prints, and also for obtaining and procuring the same with the intent and for the purpose of uttering and selling the same. He was found guilty, and sentenced to be imprisoned for two years. Whereupon a writ of error was sued out.

The indictment, which charged offences at common law, contained seven counts :—

1st count. The jurors for our lady the Queen upon their oath present that *William Dugdale* late of the parish of *Saint Clement Danes* in the county of *Middlesex* labourer being a person of most wicked and depraved mind and disposition and unlawfully and wickedly devising contriving and intending as much as in him lay to vitiate and corrupt the morals of the liege subjects of our said lady the Queen and to incite and encourage the said liege subjects to indecent obscene and immoral practices and bring them to a state of wickedness lewdness and debauchery heretofore to wit on the second day of *September* in the year of our Lord one thousand eight hundred and fifty-one at the parish aforesaid in the county aforesaid unlawfully wickedly knowingly wilfully and designedly and in order to effect and bring about such

his most wicked devices and contrivances did obtain and procure divers to wit one hundred indecent lewd filthy bawdy and obscene prints and divers to wit one hundred indecent lewd filthy bawdy and obscene pictures then and there respectively tending to scandalize and debase human nature and then and there representing and exhibiting the persons of men and women naked and partly naked in obscene and indecent attitudes postures and situations *in order and for the purpose of afterwards unlawfully and wickedly uttering publishing selling and disseminating* and causing to be uttered published sold and disseminated the said prints and pictures to and amongst the liege subjects of our said lady the Queen and thereby contaminating vitiating and corrupting the morals of the said liege subjects and bringing the said liege subjects to a state of wickedness lewdness debauchery and immorality in contempt of our said lady the Queen and her laws to the evil and pernicious example of all others in the like case offending and against the peace of our said lady the Queen her Crown and dignity.

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2nd count. And the jurors aforesaid upon their oath aforesaid do further present that the said *William Dugdale* being a person of such wicked and depraved mind and disposition as in the first count mentioned and unlawfully and wickedly devising and contriving as in that count also mentioned afterwards to wit on the same day and in the year aforesaid at the parish aforesaid in the county aforesaid unlawfully wickedly knowingly wilfully and designedly did *preserve and keep in his possession* divers to wit one hundred other indecent lewd filthy bawdy and obscene prints and divers to wit one hundred other indecent lewd filthy bawdy and obscene pictures then and there respectively tending to scandalize and debase human nature and then and there exhibiting and representing the

1853. persons of men and women naked and partly naked in obscene and indecent attitudes postures and situations with *the intent and for the purpose of* unlawfully and wickedly uttering selling publishing and disseminating the said last mentioned prints and pictures and causing the same to be uttered sold published and disseminated to and amongst the liege subjects of our said lady the Queen and thereby contaminating vitiating and corrupting the morals of the said liege subjects and bringing the said liege subjects to a state of wickedness lewdness debauchery and immorality in contempt of our said lady the Queen and her laws to the evil and pernicious example of all others in the like case offending and against the peace of our said lady the Queen her Crown and dignity.

3rd count. And the jurors aforesaid upon their oath aforesaid do further present that the said *William Dugdale* being a person of such wicked and depraved mind and disposition as in the said first count mentioned and unlawfully and wickedly devising and contriving as in that count also mentioned afterwards to wit on the same day and in the year aforesaid at the parish aforesaid in the county aforesaid unlawfully *did obtain and procure* a certain wicked lewd bawdy and obscene libel in which said libel (amongst divers other wicked lewd bawdy and obscene matters contained therein) it contained according to the tenor and effect following that is to say &c. (a) *in order for the purpose of* afterwards unlawfully and wickedly uttering selling publishing and disseminating the said last mentioned lewd filthy bawdy and obscene libel and unlawfully causing the

(a) The words of the obscene libel were here set out. As to *Libels* subversive of morality and tending to corrupt the minds and morals of the people, see *Rex v. Curl*, 2 Str. 788; *Rex v. Wilks*, 4 Burr. 2527.

same to be uttered sold published and disseminated to and amongst the liege subjects of our said lady the Queen and thereby contaminating vitiating and corrupting the morals of her said liege subjects and bringing the said liege subjects to a state of wickedness lewdness debauchery and immorality in contempt of our said lady the Queen and her laws to the evil and pernicious example of all others in the like case offending and against the peace of our said lady the Queen her Crown and dignity.

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4th count. And the jurors aforesaid upon their oath aforesaid do further present that the said *William Dugdale* being a person of such wicked and depraved mind and disposition as in the said first count mentioned and unlawfully and wickedly devising and contriving as in that count also mentioned afterwards to wit on the same day and in the year aforesaid at the parish aforesaid in the county aforesaid unlawfully wickedly knowingly wilfully and designedly *did obtain and procure* divers to wit one hundred wicked lewd bawdy and obscene libels *in order and for the purpose* of afterwards and unlawfully and wickedly uttering publishing selling and disseminating and causing to be uttered published sold and disseminated the said wicked lewd bawdy and obscene libels to and amongst the liege subjects of our said lady the Queen and thereby contaminating vitiating and corrupting the morals of the said liege subjects and bringing the said liege subjects to a state of lewdness debauchery and immorality in contempt of our said lady the Queen and her laws to the evil and pernicious example of all others in the like case offending and against the peace of our said lady the Queen her Crown and dignity.

5th count. And the jurors aforesaid upon their oath aforesaid do further present that the said *William Dugdale* being a person of such wicked and depraved

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mind and disposition as in the said first count mentioned and unlawfully and wickedly devising and contriving as in that count also mentioned afterwards to wit on the same day and year aforesaid at the parish aforesaid in the county aforesaid unlawfully wickedly knowingly wilfully and designedly *did preserve and keep in his possession* divers to wit one hundred other wicked lewd bawdy and obscene libels *in order and for the purpose* of unlawfully and wickedly uttering selling publishing and disseminating the said last mentioned libels and causing the same to be uttered sold published and disseminated to and amongst the liege subjects of our said lady the Queen and thereby contaminating vitiating and corrupting the morals of the said liege subjects and bringing the said liege subjects to a state of wickedness lewdness debauchery and immorality in contempt of our said lady the Queen and her laws to the evil and pernicious example of all others in the like case offending and against the peace of our said lady the Queen her Crown and dignity.

6th count. And the jurors aforesaid upon their oath aforesaid do further present that the said *William Dugdale* being a person of such wicked and depraved mind and disposition as in the first count mentioned and unlawfully and wickedly devising and contriving as in that count also mentioned afterwards to wit on the same day and in the year aforesaid at the parish aforesaid in the county aforesaid unlawfully wickedly knowingly wilfully and designedly *did obtain and procure* divers to wit one hundred wicked lewd bawdy and obscene libels *in order and for the purpose* of afterwards unlawfully and wickedly uttering publishing and disseminating and causing to be uttered published and disseminated the said wicked lewd bawdy and obscene libels to and amongst the liege subjects of our lady the Queen and thereby contaminating vitiating

and corrupting the morals of the said liege subjects and bringing the said liege subjects to a state of wickedness lewdness debauchery and immorality in contempt of our said lady the Queen and her laws to the pernicious example of all others in the like case offending and against the peace of our said lady the Queen her Crown and dignity.

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7th count. And the jurors aforesaid upon their oath aforesaid do further present that the said *William Dugdale* being a person of such wicked and depraved mind and disposition as in the first count mentioned and unlawfully and wickedly devising and contriving as in that count also mentioned afterwards to wit on the same day and in the year aforesaid at the parish aforesaid in the county aforesaid unlawfully wickedly knowingly wilfully and designedly *did preserve and keep in his possession* divers to wit one hundred other wicked lewd bawdy and *obscene libels in order and for the purpose* of unlawfully and wickedly uttering publishing and disseminating the said last mentioned libels and causing the same to be uttered published and disseminated to and amongst the liege subjects of our said lady the Queen and thereby contaminating vitiating and corrupting the *moral*s of the said liege subjects and bringing the said liege subjects to a state of wickedness lewdness debauchery and immorality. In contempt of our said lady the Queen and her laws, to the evil and pernicious example of all others in the like case offending and against the peace of our said lady the Queen her Crown and dignity.

The errors assigned were, that the indictment shewed no offence upon the face thereof known to the law; the first count merely charging the defendant with procuring *indecent pictures* for the purpose of afterwards unlawfully publishing and selling them, which was not an iudictable offence; the second

1853. count with keeping the same pictures in his possession for the same purpose ; the third, fourth, and sixth counts with procuring *obscene libels* for a like purpose ; and the fifth and seventh counts charging the defendant with keeping in his possession the same *obscene libels* for the same purpose ; and the plaintiff in error prayed that the judgment, for these errors and other errors appearing in the record and proceedings, might be reversed, annulled, &c.

Joinder in error.

On the 26th *January*, A. D. 1853, this case was argued before Lord CAMPBELL C. J., COLERIDGE J., WIGHTMAN J., and CROMPTON J.

Clarkson and *Bodkin* for the Crown. *Metcalfe* for the plaintiff in error.

Clarkson said that before the plaintiff's counsel was heard, he would take the opinion of the Court whether *Dugdale* ought not to be present in Court to abide the result of their lordships' decision ?

Lord CAMPBELL C. J.—In case the conviction is affirmed the defendant will be required to appear in Court ; but he is not bound to be present till then (*a*).

Metcalfe being about to proceed with his argument,

Lord CAMPBELL C. J. said that the plaintiff in error had not delivered his *paper books* as he was bound to do by the rules of the Court, and he was now in a position in which the Court might give judgment against him (*b*).

(*a*) As to the provisions of 8 & 9 Vict. c. 68, respecting bail in error, see *post*, p. 76.

(*b*) It is ordered by *Reg. Gen. Cr. Off.* 22, that in all cases entered for argument in the *Crown Paper*, the prosecutor or his attorney shall deliver a *paper book*, of the proceedings to each of the two senior Judges of the Court;

and the defendant or his attorney shall, in like manner, make and deliver a paper book to the third and fourth Judge of the said Court respectively, two days before the day on which the case will be put in the paper for argument ; and such several paper books shall in all cases, (except where a special case is reserved for the opinion of

*Metcalf*e said, the omission to furnish the Judges with paper books, on the part of the plaintiff in error, must have been accidental; and prayed the Court to postpone the case in order to enable him to have them prepared.

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Lord CAMPBELL C. J. said, that although it was inconvenient to the Court to hear the argument without the delivery of a paper book to each of the Judges; yet, as the paper books of the Crown had been delivered, and the counsel for the Crown were ready, the case might proceed.

*Metcalf*e. The indictment contained seven counts, which might be divided into two classes;—the first, stating the offence to be having possession of indecent prints and libels; the second, procuring them. It must be admitted, that if any one count be good, judgment must be given for the Crown. In the first place, having possession of indecent pictures with whatever intent, it is submitted, is no offence at common law.

Lord CAMPBELL C. J.—It may be that it is not an indictable offence for a man to have in his possession such things merely for the indulgence of his own prurient imagination; but if he have them in his possession for the purpose and with the intent to sell and publish them, that may be a different question.

*Metcalf*e. It cannot be an offence merely to *intend* to sell and publish indecent prints or libels. The law takes no notice of intentions which do not pass into acts. If any *act* were done in furtherance of the unlawful intention, that would unquestionably

the Court), contain in the margin thereof, or appended thereto, and to be delivered therewith, the points intended to be argued, but shall not contain any other observation or matter than such points for argument, together with copies of the proceedings, and a

copy of the rule *nisi* to quash, or for a *concilium*; and judgment shall be given by the party neglecting to deliver paper books to the Judges, or delivering the same without points for argument, if the Court shall so please.

DUGDALE'S Case. 1853. be a misdemeanor. If an attempt had been made to sell,—if, for example, the person indicted had gone at the instigation of a customer to get the pictures, and before he had taken them from out of the drawer, or off the shelf where they were, he had been interrupted by a police officer, there would be an act done in advancement of an unlawful purpose—an attempt to commit a misdemeanor. But an *intent of the mind* afterwards to disseminate and publish the prints, was not *per se* an indictable offence, for he might alter his intention and not disseminate them. These pictures might have been found by him among other property left to him by will ; they might have been left at his house for inspection without his concurrence ; and he might have said to some one that he would sell them, but afterwards came to a different resolution.

Lord CAMPBELL C. J.—Suppose the plaintiff in error, when first the pictures came into his possession had an innocent intention,—had resolved to burn them, but that afterwards, it may be while he was in bed, his good mind alters and he then entertains the intention of selling them, can it be said that he then becomes indictable, not being so before ?

Metcalfe. In the case of *Rex v. Sutton*, Rep. temp. Hardw. 370, 2 Str. 1074, it was held, that having instruments of coining in a man's possession with *intent* to coin money, was indictable as a misdemeanor ; but that case was afterwards overruled by a later decision of the Judges in *Rex v. Heath*, Russ. & Ry. 184.

COLERIDGE J.—Lord Hardwicke, in the case of *Rex v. Sutton*, held that possession merely was not an indictable offence.

Metcalfe. He doubted whether a bare possession with intent to utter, without an uttering, was an indictable offence.

Lord CAMPBELL C. J.—In the case of *Rex v. Heath* did the Judges hold that having possession of counterfeit coin with intent to utter, without any act done in furtherance of the intention, was not indictable as a misdemeanor?

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Metcalfe. That was so.

Lord CAMPBELL C. J.—That decision goes a long way in support of your position.

Metcalfe. It is not contended that such an act as packing up the pictures for the purpose of delivery would not be an indictable offence; but having them in possession with the intent of selling them is not so.

Lord CAMPBELL C. J.—In the former case there would be the commencement of a misdemeanor.

Metcalfe. The second class of counts in the indictment charge that the plaintiff in error procured indecent pictures and libels for the purpose of afterwards unlawfully publishing and selling them.

Lord CAMPBELL C. J.—What do you say to the first count?

COLERIDGE J.—How can you distinguish the charge in the first count from the case of *Rex v. Fuller*, Russ. & Ry. 308, where the Judges were unanimously of opinion, that *procuring* base coin with intent to utter it, was a misdemeanor; and that *having in it possession*, unaccounted for, was *evidence* of procuring?

Metcalfe. Does it sufficiently appear that the act of procuring laid in the first count, is in pursuance of a misdemeanor? Suppose a man, contemplating the commission of a burglary, gets a key made with *intent* to commit a burglary, would that be indictable as a misdemeanor (*a*)? The recent act 14 & 15 Vict. c. 19,

(*a*) In the case of *Rex v. Burdett*, 4 B. & Ald. 95, it was doubted whether the mere writing and composing of a libel with *intent to pub-*

lish, but not followed by publication was an indictable offence: See also *Rex v. Burdett*, 3 B. & Ald. 717.

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1853. declares it to be a misdemeanor to be found in possession of a key or an offensive weapon with intent to commit a burglary; if it had been an offence at common law it would have been unnecessary to pass the act of Parliament (*a*).

Lord CAMPBELL C. J.—The act 14 & 15 Vict. c. 19 contains several stringent provisions, and alters the punishment.

Metcalfe. The indictment charges that the defendant purchased and procured the pictures with intent to corrupt the morals of the public, but does not lay an intent to utter and publish them for the purpose of corrupting the public morals.

Clarkson was not called upon by the Court.

Lord CAMPBELL C. J.—I am of opinion that judgment must be affirmed upon one class of counts, and not upon the other. In both cases we have decisions to guide us, and we see no reason to question the soundness of those decisions. On the authority of *Rex v. Heath* (*b*), we must hold the first class of counts bad; because they are consistent with the possibility that the plaintiff in error may have had the pictures

(*a*) The 5 Geo. 4, c. 83, s. 4, enacted that every person having in his possession or custody any picklock, key, &c. with a felonious intent, should be deemed a *rogue* and a *vagabond*.

The words of that statute are nearly in the same words as those of 23 Geo. 3, c. 88, which said “If any person shall be apprehended having upon him any picklock key, crow, jack, bit or any other implement with an intent feloniously to break and enter into any dwelling-house, warehouse, coach-house, stable or out-house shall be

deemed a *rogue* and a *vagabond* within 17 Geo. 2, c. 8.”

Leach, in his edition of *Hawkins' Pleas of the Crown*, remarks upon this statute, “N.B.—This was a misdemeanor at common law.”

In the case of *Rex v. Lee and Others*, Old Bailey, A.D. 1689, the prisoners were convicted on an indictment charging them with having in their custody divers picklock keys with intent to break into a house and steal the goods therein. *Cas. temp. Hardw.* p. 371.

(*b*) *Russ. & Ry.* 184.

in his possession with an innocent intention; and there is no act shewn to be done which can be considered as the first step in the prosecution of a misdemeanor. In the case of *Rex v. Heath*, the prisoners were indicted for having in their possession base coin with intention to utter it, and all the Judges on consideration held that that was not in itself an indictable offence although having the base coin in possession was evidence of having procured it with intent to utter it. In the other case (*a*) the Judges held that procuring base coin for the purpose of afterwards uttering it was an unlawful act done in furtherance of a misdemeanor, and was without doubt an offence punishable by indictment at common law. Now apply these cases to the present one. The having possession of base coin is now provided for by statute; no statute has been passed with respect to the possession of indecent prints, but procuring such prints is an offence against the common law of England (*b*). Procuring is an overt act; an unlawful step taken in pursuance of the abominable offence of circulating obscene prints to deprave and corrupt the public morals.

COLERIDGE J.—The law will not take notice of a bare intention without some act done in furtherance of it; but procuring indecent prints or pictures with

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(*a*) *Rex v. Fuller*, Russ. & Ry. 308.

(*b*) As to indictments at Common Law for offences against public morals or decency, see *Sedley's case*, Sid. 168, 2 Str. 791; *Wilkes' case*, 4 Burr. 2530; *Holt on Libel*, 73, 284; *Dodd's case*, 2 Sess. Ca. 33; *Starkie on Slander*, 159; 1 Russ. on Crimes, 233; 3 Burn's J. "Lewdness," 721; 2 Chit. Crim. L. 42; 3 Geo. 4, c. 40, s. 3. It is provided

by 14 & 15 Vict. c. 100, s. 29, that when any person is convicted of the offence of "any public selling or exposing for public sale or to public view, of any obscene book, print, picture, or other indecent exhibition," it shall be lawful for the Court to order him to be imprisoned for any term warranted by law, and kept to hard labour.

1853. intent to circulate them is clearly such an act as by law is indictable as a misdemeanor.

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WIGHTMAN J. and CROMPTON J. concurred.

Judgment for the Crown.

Lord CAMPBELL C. J.—Let the defendant's bail now produce the defendant in Court, not for sentence, but in order that the Court may commit him to prison.

Neither the defendant nor his bail appeared in Court when called.

Clarkson prayed that the recognizances of the defendant and his bail be estreated.

The Court ordered the recognizances to be estreated, but intimated that if the defendant surrendered in the course of the day the estreat would be removed.

Clarkson observed that the stat. 8 & 9 Vict. c. 68(a)

(a) The Act 8 & 9 Vict. c. 68, for staying execution of judgment for *misdemeanors* upon giving Bail in Error, provides, That in every case of judgment, whether given before or after the passing of this act for a misdemeanor, where the defendant or defendants shall have obtained a writ of error to reverse such judgment, execution thereupon shall be stayed *until such writ of error shall be finally determined*; and in case the defendant or defendants shall be imprisoned under such execution, or any fine shall have been levied, either in whole or in part, in pursuance of such judgment, the said defendant or defendants shall be entitled to be discharged from imprisonment, and to receive back any money levied on account of such fine from the person or persons in whose possession the same shall be, *until*

such final determination as aforesaid; Provided always, that no execution upon any such judgment shall be stayed unless and until the defendant or defendants shall become bound by recognizance, to be acknowledged before one of the Judges of her Majesty's Court of Queen's Bench, or one of the commissioners appointed to take special bail in actions depending in the superior courts, with two sufficient sureties, to be approved of by such judge or commissioner, in such sum as such judge or commissioner shall direct, to prosecute the writ of error with effect, and in case the judgment shall be affirmed forthwith to render the said defendant or defendants to prison, according to the said judgment, where imprisonment shall have been adjudged; and every such recognizance shall, after justification of

was very defective in not having made it a condition of the recognizances that the plaintiff in error should

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bail, be filed of record in the said Court of Queen's Bench, in like manner and upon payment of the like fees as in the case of other recognizances filed in the Crown office in that court; and the judge of the said Court of Queen's Bench, and the said commissioner, shall have the like powers in respect of the justifying such bail in error, and the examination of the sureties, and the like rules shall apply, as in respect of special bail in actions depending in such Court: Provided always, that in the case of any defendant under legal disability, it shall be sufficient if two persons, to be approved of by such judge or commissioner, shall become bound by recognizance on the behalf of such defendant, to be acknowledged and conditioned as aforesaid.

Sect. 2. And be it enacted, That the clerk of the Crown in the said Court of Queen's Bench shall for the purposes hereinafter mentioned make out and deliver to the defendant or defendants, or his or their lawful attorney, certificates in writing under his hand that such recognizance is duly filed of record in such court, upon payment of the like fee as for other certificates delivered at the Crown office; and any such certificate, when duly verified by affidavit to be made before one of the Judges of the superior courts of common law, or a commissioner duly authorized, shall be a sufficient warrant to every gaoler or other person having custody of such defendant or defendants in execution of such judgment to discharge him or them out of custody, and also to every

person having in his possession the whole or any part of any fine levied in execution of such judgment, to authorize and require the repayment thereof to the defendant or defendants; but no person who shall have received any such money, and have paid it over to any other person, according to the course of the Exchequer, shall be liable to repay to the defendant or defendants any part of the money so paid over.

Sect. 3. And be it enacted, That where judgment upon such writ of error shall be affirmed, and imprisonment shall have been adjudged, the period for its continuance in pursuance of such judgment, if such imprisonment shall not have commenced under such execution, shall be reckoned to begin from the day when such defendant or defendants shall be in actual custody under such judgment; and if the defendant or defendants shall have been discharged from imprisonment in manner hereinbefore provided, such defendant or defendants shall be liable to be imprisoned for such further period, as with the time during which such defendant or defendants may already have been imprisoned under such execution, shall be equal to the period for which such defendant or defendants was or were so adjudged to be imprisoned as aforesaid.

Sect. 5, in case of delay or neglect to prosecute, provides, That the Court in which any such writ of error shall be pending shall upon motion in that behalf decide that the defendant or defendants by whom it shall be brought has

1853. appear in Court upon the argument of the errors, and abide the result.
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or have wilfully delayed or neglected to prosecute the same with effect, it shall be lawful for such Court to order the writ of error to be quashed, and thereupon the

defendant or defendants who brought such writ of error shall be liable to execution upon the judgment.

FORM OF MEMORIAL TO ATTORNEY GENERAL FOR WRIT OF ERROR.

THE provisions of the Common Law Procedure Act (15 & 16 Vict. c. 76, s. 148), abolishing Writs of Error in Actions, do not apply to Criminal Cases; and before the Writ of Error can be obtained at the Petty Bag Office, the *fiat* of the *Attorney General* must, as heretofore, be obtained. The memorial to the *Attorney General* in the foregoing case was in the following form:—

THE QUEEN v. WILLIAM DUGDALE.

"To Her Majesty's *Attorney General*.

"The humble memorial of *William Dugdale*, the above-named defendant. Sheweth,

"That your memorialist has been indicted, tried, convicted, and sentenced to imprisonment at the General Quarter Sessions of the Peace holden for the county of *Middlesex*, all of which the annexed copy of the record of the said indictment, conviction, and sentence sheweth. That the annexed is a true and correct copy of the same record. And your memorialist further submits that there is error in the said record, as

will be seen by reference to the said copy thereof."

"The following causes of error arising thereon are respectively submitted to Her Majesty's *Attorney General*, and his fiat to proceed in prosecuting the same upon the usual terms is humbly requested.

"That the indictment shews no offence known to the law, and does not warrant the said conviction and sentence.

"That the first count of the said indictment charges the defendant merely with procuring indecent pictures for the purpose of afterwards unlawfully publishing and selling them—which is not an offence known to the law, nor punishable by indictment.

"That the second count charges the keeping the same pictures in possession with a similar purpose and that this also is not an indictable offence.

"That the third, fourth and sixth counts charge the defendant with procuring obscene libels with a like purpose. That this also is not an indictable offence.

"That the fifth and seventh counts charge the defendant with keeping in possession the same

obscene libels with a like purpose. That this also is not an indictable offence.

"And that there are divers other errors in the said record."

For modern forms of *Præcipes* and *Fiats*, see *Arch. Crim. Pl. Ev. & Prac.* by *Welsby* (12th ed.), 160, 161.

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REGINA v. ARCHIBALD WILSON.

1853.

THE above named defendant was on the 19th *December*, A. D. 1851, committed by Mr. Alderman *Hunter*, the then Lord Mayor, to take his trial at the then ensuing session of the Central Criminal Court, for having unlawfully assaulted one *Harry Harwood*, with intent to commit an abominable offence. It appeared from affidavits in the case that it is the custom and practice for the said mayor and aldermen of the city of *London*, upon their committing persons charged with serious offences, particularly with offences of the description with which the defendant was charged, and where there is a probability, either from the position in society of the party accused, or the inability from poverty, or other circumstances, of the person preferring the charge to prosecute, that justice is likely to be, or may be frustrated or impeded if the prosecution be left in the hands of the party complaining, to direct the City solicitor to conduct the prosecution of the case; that in pursuance of such custom and practice, as the said *Harry Harwood* and his father were in poor and needy circumstances, and as the said *Archibald Wilson* was a person of some wealth and station in society, the said Lord

Where the expenses of a prosecution conducted by the City solicitor at the direction of the Lord Mayor of *London*, were paid out of the funds of the corporation: Held, that the Court had no power to order the defendant to pay the costs of the prosecution incurred by the removal of the indictment by *certiorari*, on his conviction, such a case not being within 5 & 6 Wm. & M. c. 11, s. 3.

1853. Mayor directed the City solicitor to conduct the prosecution in this case ; and acting under such directions, he accordingly preferred an indictment against the defendant at the *January Sessions* of the Central Criminal Court, A. D. 1852.

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1st count. For assaulting with intent to commit, &c.

2nd count. For inciting to the commission of that offence.

3rd count. For an indecent assault.

4th count. For a common assault.

It further appeared, that the grand jury returned a true bill, and that an application was shortly afterwards made on behalf of the defendant to have the trial postponed until the then next Sessions which were to be holden on the 2nd *July*, A. D. 1852, which application was granted by the Court ; that an application was subsequently made for a writ of *certiorari* to remove the said indictment into the Queen's Bench, and that such writ was granted accordingly. The usual recognizances were entered into by the defendant, and two gentlemen as his bail, the defendant, in the sum of 200*l.*, and the bail in the sum of 100*l.* each. Notice of trial was given, and a special jury struck at the instance of the defendant, and on the 3rd *July* last, A. D. 1852, the case was tried before the Lord Chief Justice at *Guildhall*, in the city of *London*, when Sir *F. Thesiger* (the then Attorney General), *Ballantine* and *Brown* appeared for the said defendant, when the City solicitor, acting upon such before mentioned directions from the Lord Mayor, prepared briefs, and instructed counsel to appear and conduct the prosecution, *Hugh Hill*, Q. C. being for the Crown. The defendant was found guilty upon the third and fourth counts of the said indictment,

and was then and there sentenced to be imprisoned and kept to hard labour in the House of Correction in and for the city of *London*, for six months.

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It further appeared that the costs and charges of and relating to the prosecution of the defendant in the Queen's Bench were *charged to and paid out of the funds of the Corporation of the city of London*.

In the ensuing *Michaelmas* Term judgment was signed in the Queen's Bench, and a side bar rule for the costs, and an appointment to tax the same, obtained and served upon the defendant's attorney.

Sir *F. Thesiger*, on the 12th *January*, A. D. 1853, moved the Queen's Bench for a rule to set aside the side bar rule. This was an indictment for an assault upon a boy, and after the indictment was found, it was removed into this Court by *certiorari*. The prosecution was conducted by the City solicitor, by the desire of the presiding alderman. He was not instructed either by the boy, or the father of the boy, to conduct the prosecution. The defendant was convicted, and a bill of costs had been delivered by the City solicitor for the costs of the prosecution. The officer of the Court postponed the taxation of the costs to afford the defendant an opportunity of taking the opinion of the Court as to whether the City solicitor is entitled to the costs in this case, under 5 & 6 *Wm. & M. c. 11, s. 3*.

COLERIDGE J.—Is there not a case where the expense of the conviction was allowed?

Sir *F. Thesiger*. There is such a case. This is a different case from that, because it cannot by any possibility come within the terms of the act of Parliament 5 & 6 *Wm. & M. c. 11, s. 3*, “that if the defendant prosecuting such writ of *certiorari* be convicted of the

1853. offence for which he was indicted, then the Court of King's Bench shall give reasonable costs to the prosecutor if he be the party grieved or injured, or be a justice of the peace, mayor, bailiff, constable, headborough, tything-man, churchwarden, or overseer of the poor, or any other civil officer who shall prosecute upon account of any fact committed or done that concerned him or them as officer or officers to prosecute or present, which costs shall be taxed according to the course of the said Court." Now this is not a prosecution by "the party grieved;" the costs are, in fact, claimed by the City solicitor.

Lord CAMPBELL C. J.—It cannot be by the party aggrieved himself.

Sir F. Thesiger. No; nor can it be in respect of "any fact which concerns any officer or officers." The prosecution directed is not on that account; the words are, or be a justice (or other persons, who are named), "who shall prosecute upon the account of any fact committed or done that concerned him or them as officer or officers." It is quite clear that this being an assault upon a boy, it cannot be a case which the Legislature could have contemplated.

Lord CAMPBELL C. J.—In the case to which reference has been made, the Court went so far as to say, that if it was the *duty* of the person to prosecute, it was a prosecution the costs of which would be allowed.

Sir F. Thesiger. Then that would apply, in fact, to every case in which a justice of the peace directed a prosecution. It is difficult to see that there can be any qualification or exception. It is submitted, that what the Legislature intended was this, that if the prosecution is by the party grieved, then he shall have his costs; or, if it is for any offence which concerns the party as an officer to prosecute, and he prosecutes accordingly, then he shall have his costs.

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Lord CAMPBELL C. J.—Take a rule to shew cause.
The case referred to is in 15 Q. B. 1060.

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*Rule nisi.*WILSON's
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On the 27th *January*, cause was shewn against the rule for setting aside the side bar rule; Lord CAMPBELL C. J., COLERIDGE J., ERLE J., and CROMPTON J., being the Judges present.

Hugh Hill Q. C., contended that the prosecutor was entitled to his costs, under the statute 5 & 6 Wm. & M. c. 11, s. 3. He relied upon a recent case in which costs had been allowed by this Court, where the prosecution had been instituted by the Guardians of the *West London Union*, 15 Q. B. 1060.

COLERIDGE J. referred to a case in this Court when he was at the Bar, of a prosecution, for disinterring a body for the purpose of dissection, where the expenses of the prosecution having been defrayed by public subscription, it was held that the case was not within the act of Parliament. He had forgotten the name of the case and where it was reported; but he remembered the fact, having been one of the counsel who argued it (*a*).

Hugh Hill Q. C. argued that the case was within the 3rd section of 5 & 6 Wm. & M. c. 11, and cited *Reg. v. Waldegrave*; *Rex v. Edmonds*, 5 B. & Adol. 407, note (*a*). In *Rex v. Kettleworth*, 5 T. R. 33, it was held, that a justice who indicted a road for being out of repair, the indictment being afterwards re-

(*a*) The case in his Lordship's memory was *Rex v. Cook*, 1 Man. & Ryl. 526, in which it was held that where the expenses of an indictment for a misdemeanor (disinterring a body for the purposes of dissection) were defrayed by subscription, and the nominal

prosecutors (^{re}near relatives of the deceased) incurred no expense, they were not entitled to costs as prosecutors within 5 Wm. & M. c. 11, s. 3. Mr. Coleridge was for the defendant, on the argument of the rule in the Queen's Bench.

1853. moved by *certiorari*, was entitled to costs upon the conviction of the defendant. The present is even a stronger case than that.

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Sir F. *Thesiger* was not called upon.

Lord CAMPBELL C. J.—It is to be regretted that the Court has no power to award the prosecutor his costs in this case. The prosecution was a most laudable one, but the decision of the Court must be regulated by the act of Parliament and the rules of law. It is admitted that unless the case be within the stat. 5 & 6 Wm. & M. c. 11, s. 3, the Court would have no power to order the costs to be paid. On looking at the statute it appears that the object of the enactment was to indemnify the prosecutor from the costs which he must pay himself, unless paid by the party convicted. Here, however, the costs would not be paid by the prosecutor, but they would come out of the funds of the city of *London*. In the case 15 Q. B. 1060, relied upon by the Crown, the guardians of the *West London Union* could not have charged the expenses of the prosecution either upon the rates of the parish or the union. The object of the statute being to indemnify the prosecutor from the liability which he would otherwise incur to pay the costs out of his own pocket, and the Lord Mayor not being in this case personally liable, the case is not within the scope of the act of Parliament, and the rule to rescind the side bar rule for the taxation of costs must be made absolute.

COLERIDGE J., ERLE J., and CROMPTON J., concurred.

REGINA v. JOHN HENRY NEWMAN, D.D.

1852.

THIS was an application for a *new trial* on a criminal information (*a*) for libel filed against the defendant by order of the Court. The information was in form and effect as follows :—

In the Queen's Bench, *Michaelmas Term, 15 Vict. A.D. 1851. Middlesex.*

Be it remembered, that *C. F. Robinson Esquire, coroner and attorney of our lady the Queen in the Court of Queen's Bench, who prosecutes for our said lady the Queen in this behalf, comes here into the said Court at Westminster, the 21st day of November, in the fifteenth year of the reign of our said Lady, and gives the Court to understand and be informed that*

(*a*) Rule *nisi* for the information Nov. 1851; made absolute 21st moved for by Sir *F. Thesiger, 4th Nov. 1851.*

1. Where a defendant means to move for a new trial in the case of a criminal information, the motion must be made, or an intimation that the defendant intends to move, given to the Court during the first four days of term; and it will be too late when the defendant is brought up for judgment.

2. Evidence that the identical charges conveyed in a libel had, before the time of composing and publishing the libel, appeared in another publication, which was brought to the prosecutor's knowledge, but against the publisher of which he took no legal proceedings, is not admissible under a plea of justification under stat. 6 & 7 Vict. c. 96, s. 6.

3. A document under the seal of the *Court of the Holy Office or Inquisition of Rome*, but apparently drawn up by the notary whose name is attached to it, from a record in that Court, but which was not set forth in the document, is not evidence to prove the grounds of a judgment pronounced by that Court, the *ratio decidendi* not being stated, although it is admissible in support of an allegation in a plea of justification that such a judgment has been pronounced.

4. Where a plea of justification under stat. 6 & 7 Vict. c. 96, s. 6, contains several charges and the defendant fails to prove *any* of the matters alleged in such justification, the jury must, of necessity, find a verdict for the Crown, *i. e.* that the defendant has not proved the whole plea.

5. Under the stat. 6 & 7 Vict. c. 96, s. 6, the Court is bound to consider whether the guilt of the defendant convicted by a jury, is aggravated or mitigated by the plea and the evidence to prove or disprove the same, and to form its own conclusion upon the whole case.

7. Affidavits explaining the defendant's reasons for having placed certain allegations injurious to the prosecutor in his plea of justification, in support of which no evidence was given at the trial are receivable in mitigation of punishment, but not as proving the truth of the charges made in them.

8. But where a document purporting to have been an official record of the conviction of the prosecutor, before a Foreign Police Court was annexed to an affidavit, for the purpose of shewing the *bona fides* of an allegation in the plea of justification: *Held*, inadmissible, as its admission would, in effect, put the prosecutor on his trial without his being able to make defence.

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John Henry Newman, Doctor of Divinity, late of the parish of *Aston*, in the county of *Warwick*, contriving and wickedly and maliciously intending to injure and vilify one *Giovanni Giacinto Achilli*, and to bring him into great contempt, scandal, infamy, and disgrace, on the 1st of *October*, A.D. 1851, did falsely and maliciously compose and publish a certain false, scandalous, malicious, and defamatory libel containing divers false, scandalous, malicious, and defamatory matters concerning the said *Giovanni Giacinto Achilli*, that is to say (a)—“ And in the midst of outrages such as these, my brothers of the oratory, wiping its mouth and clasping its hands, and turning up its eyes, it trudges to the *Town Hall* to hear Dr. *Achilli* expose the *Inquisition*. Ah ! Dr. *Achilli*, I might have spoken of him last week had time admitted of it. The Protestant world flocks to hear him because he has something to tell of the Catholic church. He has something to tell, it is true ; he *has* a scandal to reveal, he *has* an argument to exhibit. It is a simple one, and a powerful one, as far as it goes—and it is *one*. That one argument is himself ; it is his presence which is the triumph of Protestants ; it is the sight of him which is a Catholic’s confusion. It is, indeed, our confusion that our Holy Mother could have had a priest like him. He feels the force of the argument, and he shews himself to the multitude that is gazing on him. ‘ Mothers of families,’ he seems to say, ‘ gentle maidens, innocent children, look at me, for I am worth looking at. You do not see such a sight every day. Can any church live over the imputation of such a production as I am ? I have been a *Roman* priest and a hypocrite ; I have been a profligate under a cowl ; I am that Father *Achilli* who as early as 1826 was deprived of my faculty to lecture for an offence which my superiors did their best to

(a) The libel was set out with *innuendos* which are here omitted.

conceal, and who in 1827 had already earned the reputation of a scandalous friar. I am that *Achilli* who, in the diocese of *Viterbo* in *February*, 1831, robbed of her honour a young woman of eighteen, who in *September*, 1833, was found guilty of a second such crime in the case of a person of twenty-eight, and who perpetrated a third in *July*, 1834, in the case of another aged twenty-four. I am he who afterwards was found guilty of sins similar, or worse, in other towns of the neighbourhood. I am that son of *St. Dominic*, who is known to have repeated the offence at *Capua* in 1834 and 1835, and at *Naples* again in 1840, in the case of a child of fifteen. I am he who chose the sacristy of the church for one of these crimes, and *Good Friday* for another. Look on me, ye mothers of *England*, a confessor of Popery, for ye 'ne'er may look upon my like again.' I am that veritable priest who, after all this, began to speak against not only the Catholic faith but the moral law, and perverted others by my teaching. I am the Cavaliere *Achilli* who then went to *Corfu*, made the wife of a tailor faithless to her husband, and lived publicly and travelled about with the wife of a chorus singer. I am that professor in the Protestant college at *Malta* who, with two others, was dismissed from my post for offences which the authorities could not get themselves to describe. And now, attend to me such as I am, and you shall see what you shall see about the barbarity and profligacy of the inquisitors of *Rome*.' You speak truly, O *Achilli*, and we cannot answer you a word. You are a priest; you have been a friar; you are, it is undeniable, the scandal of Catholicism and the palmary argument of Protestants, by your extraordinary depravity. You have been, it is true, a profligate, an unbeliever, and a hypocrite. Not many years passed of your conventional life, and you were never in choir, always in private

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houses, so that the laity observed you. You were deprived of your professorship, we own it; you were prohibited from preaching and hearing confessions; you were obliged to give hush money to the father of one of your victims, as we learn from the official report of the police at *Viterbo*. You are reported in an official document of the *Neapolitan* police to be 'known for habitual incontinency;' your name came before the civil tribunal at *Corfu* for your crime of adultery. You have put the crown on your offences by, as long as you could, denying them all; you have professed to seek after truth, when you were ravening after sin. Yes, you are an incontrovertible proof that priests may fall and friars break their vows. You are your own witness; but while you *need* not go out of yourself for your argument, neither are you *able*. With you the argument begins; with you, too, it ends—the beginning and the ending you are both. When you have shewn yourself, you have done your worst and your all; you are your best argument and your sole. Your witness against others is utterly invalidated by your witness against yourself. You leave your sting in the wound; you cannot lay the golden eggs, for you are already dead." Which said false, scandalous, malicious and defamatory libel the said *John Henry Newman* did then publish to the great damage, scandal and disgrace of the said *Giovanni Giacinto Achilli*, in contempt of our said lady the Queen, to the evil and pernicious example of all others in like case offending against the peace of our said lady the Queen her Crown and dignity. Whereupon the said coroner and attorney of our said lady the Queen, who for our said lady the Queen in this behalf prosecuteth, prayeth the consideration of the Court here in the premises, and that due process of law may be awarded against the

said *John Henry Newman* in this behalf to make him answer to our said lady the Queen touching and concerning the premises aforesaid.

To this information the defendant pleaded two pleas; —the second framed under 6 & 7 Vict. c. 96, s. 6.

1st plea. In the Queen's Bench, *Michaelmas Term*, 15th Vict. 1851. "And the said *John Henry Newman* appears here in Court by *Henry Lewin*, his attorney, and the said information is read to him, which being by him heard and understood, he complains to have been grievously vexed and molested under colour of the premises, and the less justly because he saith that he is *Not Guilty* of the said supposed offences in the said information alleged," &c.

2nd plea. And for a further plea (*a*), the said *John Henry Newman* saith:—

1. That before the composing and publishing of the said alleged libel, to wit on the 1st of *January*, 1830, &c., the said *G. G. Achilli* was an infidel, to wit, at *Westminster*, in the county of *Middlesex*.

2. That the said *G. G. Achilli* was and exercised the functions of a priest of the church of *Rome* at *Viterbo*, *Capua*, *Naples*, and elsewhere, and while such priest, &c., he secretly abandoned and disbelieved the peculiar doctrines of the church of *Rome*, to wit, &c., and, though outwardly professing chastity and purity of life, he committed the several acts of fornication, adultery, and impurity hereinafter mentioned, and by reason thereof was a hypocrite.

3. That the said *G. G. Achilli* was a profligate under a cowl in that, being a member of the order of *St. Dominic* or Friars' Preachers, and bound by

(*a*) These pleas were filed 30th December, 1851. They were demurred to, and were amended. They were a second time demurred

to, as being too general in their statements, and then amended as above.

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4. That the said *G. G. Achilli* had a faculty to lecture at *Viterbo*, of which faculty, as early as 1826, he was, for certain misconduct, deprived by the superior of the order, one *F. Velzi*, but which misconduct was concealed and suppressed by the said superior, and is to the said *J. H. Newman* unknown.

5. That the said *G. G. Achilli* in 1826 was a friar of the order of *St. Dominic* in the convent of *Gradi*, at *Viterbo*, and, contrary to his duty as such friar, neglected to attend Divine service in the choir, and without the permission of his superior had frequent intercourse with persons not belonging to the said order, and so in 1827 had already earned the reputation of a scandalous friar.

6. That the said *G. G. Achilli*, in *February* 1831, at *Viterbo*, debauched, seduced, and carnally knew one *Elena Valente*, then being chaste and unmarried, and of the age of eighteen years, and then and there robbed her of her honour.

7. That the said *G. G. Achilli*, at *Viterbo*, debauched, &c., one *Rosa de Allessandris*, then being chaste and unmarried, of the age of twenty-eight years, and robbed her of her honour, and on the 1st of *September*, 1833, at *Viterbo*, was found guilty thereof, upon due inquiry before the bishop of *Viterbo*.

8. That the said *G. G. Achilli*, on the 1st of *July*, 1834, at *Viterbo*, debauched, &c., a certain other young woman of the age of twenty-four years, whose name is to the said *J. H. Newman* unknown, and then and there robbed the said woman of her honour.

9. That the said *G. G. Achilli*, at *Viterbo*, and in

the neighbourhood, committed sins similar or worse, and debauched, &c. one *Vincenza Guerra*, then being chaste and unmarried, also another woman then being chaste and unmarried, whose name is to the said *J. H. Newman* unknown; and that the said *G. G. Achilli* was afterwards, at *Rome* before the Court of the *Holy Office*, or *Inquisition*, found guilty of the said several offences.

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10. That the said *G. G. Achilli*, on the 1st of *January*, 1835, being a friar of the order of *St. Dominic*, at *Capua*, debauched, &c. a certain other woman, being chaste and unmarried, whose name is to the said *J. H. Newman* unknown.

11. That the said *G. G. Achilli*, on the 1st of *January*, 1840, at *Naples*, debauched, &c. one *Maria Giovanni Principe*, a female child of fifteen years of age, &c.

12. That the place where the said *G. G. Achilli* debauched the said *Rosa de Allessandris* was the sacristy of the church of *Gradi*, at *Viterbo*, and that the day on which he debauched the said female child at *Naples* was *Good Friday*, in the year 1840.

13. That the said *G. G. Achilli* being a priest of the church of *Rome*, at *Rome*, *Capua*, *Naples*, and *Malta*, spoke and taught against the truth of divers doctrines of the Catholic faith, to wit, &c., and also against the laws of morality, to wit, the moral obligation of chastity and continence, and thereby did pervert one *Luigi De Sanctis*, one *Fortunato Saccares*, the said *Rosa de Allessandris*, the said *Elena Valente*, and the said *Maria Giovanni Principe*, from their belief in such doctrines and obedience to such laws.

14. That on the 2nd of *July*, at *Corfu*, the said *G. G. Achilli* debauched and made faithless to her husband one *Marianna Crisaffi*, the wife of one *Nicolo*

1852. *Garamoni*, a tailor; and afterwards, on the 1st of August, 1843, at *Corfu*, the said *G. G. Achilli* publicly cohabited and committed adultery with one *Albina*, the lawful wife of *Vincenzi Coriboni*, a chorus singer, and publicly travelled about with her from *Corfu* to *Zante*.

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15. That on the 1st of *May*, 1848, and for twelve months preceding, the said *G. G. Achilli* held the office of Professor of Theology in a Protestant college, to wit, *St. Julian's College*, at *Malta*, and during that period hindered and frustrated an investigation then pending before Messrs. *Hadfield* and *Brien*, officers of the college, concerning charges of fornication and other gross immorality against one *Fortunato Saccares*, and one *Pietro Leonini*, in which charges the said *G. G. Achilli* was also implicated, by sending away the said *Fortunato Saccares* to *Sicily*, and thereupon the Earl of *Shaftesbury* and others, the committee of the said college, dismissed the said *G. G. Achilli* from his said office of professor, and that the said *G. G. Achilli* was dismissed as well for hindering and frustrating the said investigation as far as the said several acts of sin, fornication, and immorality hereinbefore mentioned, but which the said committee were then unwilling to, and have still forborne, to state and describe, and cannot get themselves to describe specifically.

16. That the said *G. G. Achilli*, in the years 1847, 1850, and 1851, being resident in *London*, did attempt to seduce and debauch one *Harriet Harris*, then being chaste and unmarried, and did conduct himself lewdly and indecently as well to the said *Harriet Harris* as to one *Jane Legg*, one *Sarah Wood*, one *Catharine Gorman*, and one *Mademoiselle Fortay*; and by reason thereof, and of the said several other matters herein-

before set forth, the said *G. G. Achilli* was guilty of extraordinary depravity, and was and is the scandal of Catholicism.

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17. That the said *G. G. Achilli* was a profligate by the commission of the said acts of profligacy, and also had been and was an unbeliever and a hypocrite.

18. That the said *G. G. Achilli*, at the *Convent of Gradi*, at *Viterbo*, in the year 1836, continually absented himself from the choir of the chancel of the said convent during Divine service, and was a frequenter of private houses, contrary to the rules of the said order of *St. Dominic*, and had thereby given offence to divers lay persons not members of the said order whose names are to the said *J. H. Newman* unknown.

19. That on the 16th day of *June*, 1841, at *Rome*, by the Court of the *Holy Office*, or *Inquisition*, the said *G. G. Achilli* was suspended from the celebration of mass, and disabled from any cure of souls, and from preaching and hearing confessions, and from exercising the sacerdotal office.

20. That after the said *G. G. Achilli* had debauched the said *Rosa de Allessandris*, at *Viterbo*, of the age of twenty-eight years, on the 1st of *September*, 1833, he was obliged to give the sum of fifty scudi (10*l.*) to the father of the said young woman as damages, and that by the official reports of the police at *Viterbo*, it is declared that the said *G. G. Achilli* had given the said money as hush money to the said father of the said young woman.

21. That on the 1st of *January*, 1839, in and by an official document or report of the officers of police at *Naples*, and being among the archives and documents of the said *Neapolitan* police, the said *G. G. Achilli* was reported and declared to be known for habitual incontinency at *Naples*.

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22. That after the said *G. G. Achilli* had debauched the said *Marianna Crisaffi*, the wife of the said *Nicolo Garamoni*, the tailor, on the 3rd of *July*, 1843, the name of the said *G. G. Achilli* came before the civil tribunal at *Corfu* in respect of the said crime of adultery—that is to say, that *Nicolo Garamoni*, by *Antonio Capello* his advocate, presented a petition to the Court, praying that a petition presented by his said wife *Marianna* for alimony should be rejected, upon the ground that the said *Marianna* had been guilty of adultery with the said *G. G. Achilli*, and offered to prove the same by lawful witnesses.

23. That the said *G. G. Achilli*, on the 1st of *January*, 1850, and on divers other days, though knowing himself to have been guilty of the several offences aforesaid, denied them all; and that the said *G. G. Achilli*, when he committed the said offences, and thereby was, in fact, ravening after sin, did profess and pretend to be seeking after truth; and that by reason of the said offences the said *G. G. Achilli* was and is unworthy to be believed in respect of the charges by him made against the doctrines and discipline of the church of *Rome*, and the persons professing the same. And so the said *J. H. Newman* says that the said alleged libel consists of allegations true in substance and in fact, and of fair and reasonable comments thereon.

“And the said *J. H. Newman* further saith, that at the time of publishing of the said alleged libel, it was for the public benefit that the matters therein contained should be published, because, he says, that great excitement prevailed and numerous public discussions had been held in divers places in *England* on divers

matters of controversy between the churches of *England* and *Rome*, with respect to which it was important the truth should be known ; and inasmuch as the said *G. G. Achilli* took a prominent part in such discussions, and his opinion and testimony were by many persons appealed to and relied on as of a person of character and respectability, with reference to the matters in controversy, it was necessary, for the purpose of more effectually examining and ascertaining the truth, that the matters in the said alleged libel should be publicly known, in order that it might more fully appear that the opinion and testimony of the said *G. G. Achilli* were not deserving of credit or consideration by reason of his previous misconduct ; and also because the said *G. G. Achilli* had been and was at *Birmingham*, *Leamington*, *Brighton*, *Bath*, *Cambridge*, *Huntingdon*, *Winchester*, and elsewhere, endeavouring by preaching and lecturing, to excite discord and animosity towards her Majesty's Roman Catholic subjects and against the religion and practice of persons professing the Roman Catholic religion, against the peace of our said lady the Queen, and it was of importance and conducive to the diminishing of such discord and animosity, and to preserve the peace of our said lady the Queen, that the said matters should be published and known to all the liege subjects of our said lady the Queen ; and also because the said *G. G. Achilli* had improperly pretended to such subjects that he was a person innocent of the said crimes and misconduct, and that he was greatly injured by the said foreign ecclesiastical tribunals, and that he had been persecuted and oppressed by the Roman Catholic Church and by the bishops and authorities thereof on account of his religious opinions, and that he was a martyr on account of his religious opinions, and by means of such improper pretences was endeavouring and was likely to obtain credit and support from such

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subjects, by reason of their being ignorant of the said misconduct of the said *G. G. Achilli*, it then became and was of public importance and for the public benefit to expose the impropriety and want of truth of such pretences, and to prevent the said subjects being deceived and misled by such pretences, and to have the real character of the said *G. G. Achilli* and his conduct made known to such subjects and the public in general. And, also, because many benevolent persons and the public generally were at that time disposed to shew kindness and assistance to the said *G. G. Achilli* on the ground of his having been harshly and unjustly treated by the said Court of the *Holy Office*, or *Inquisition*, and by the said Superior of the said Order of *St. Dominic* and on the ground that he was a person deserving of kindness and assistance, and it was for the benefit of the public that the said matters should be published for the purpose of shewing that the said *G. G. Achilli* had been treated fairly and properly and according to his deserts by the said Court and the said Superior, and that the said *G. G. Achilli* is a person wholly undeserving of kindness and assistance; and because the said *G. G. Achilli* had obtained, and was likely again to obtain, preferment and employment of public trust and confidence which he was unfit to obtain by reason of the said matters, and which he had obtained, and was likely to obtain, only by reason of the said matters being unknown and unpublished. And so the said *J. H. Newman* says he published the said alleged libel as he lawfully might for the causes aforesaid, and this the said *J. H. Newman* is ready to verify. Wherefore he prays judgment, &c."

Replication. *Hilary Term, 16th Vict. 1852.* The said *C. F. Robinson* Esq., coroner and attorney of our said lady the Queen, in the Court of Queen's Bench, who prosecutes for our lady the Queen as to

the plea first pleaded, puts himself upon the country, and as to the plea secondly pleaded saith that the said *John Henry Newman* of his own wrong, and without the cause in his said plea alleged, composed and published the said libel as in the said information alleged, &c.

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Issue joined, *Hilary Term, 16th Vict., 1852.*

The case came on for trial before Lord CAMPBELL C. J. and a special jury (*a*) at the *Middlesex* Sitting's after *Trinity Term, 21st June, 1852.* The printing and publishing of the libel were admitted by the defendant; the prosecutor admitting that if the allegations in the plea of justification were true, it was for the public benefit that the supposed libel was published. The jury found the defendant guilty on the first count; and they found that the only part of the plea of justification proved was the nineteenth, respecting Dr. Achilli being deprived of his professorship and prohibited from preaching and from hearing confessions by the *Inquisition.* The Lord Chief Justice, thereupon, directed the verdict to be entered for the Crown on both issues.

On the 22nd November, A.D. 1852, Lord CAMPBELL C. J., COLERIDGE J., WIGHTMAN J., and ERLE J., being the Judges sitting, and the defendant being present in Court, *Sir F. Thesiger* (Attorney General) with whom was *Ellis*, appeared for the Crown, and prayed judgment upon the defendant.

Sir *A. Cockburn*, *Wilkins Serjt.*, *Bramwell Q. C.*, *Addison*, and *Badeley* were counsel for the defendant.

Lord CAMPBELL C. J. said it was necessary to read the evidence through, in order that the Court might be in possession of all the circumstances of the case.

(*a*) The whole of the special jurors summoned not appearing, the Attorney General prayed a *tales.*

1852. His lordship then read the libel as set out in the information, the pleas (*a*), and the whole of the evi-

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Sir *A. Cockburn* moved for a new trial on the ground of the rejection of evidence, misdirection, and that the verdict was against evidence.

Sir *F. Thesiger*. The invariable rule has been for a defendant intending to move for a new trial to intimate his intention to the Court during the first four days of term.

Lord CAMPBELL C. J.—That certainly is the usual course.

Sir *A. Cockburn*. The rule referred to applied to civil cases, because if the unsuccessful party did not move within the four days the other party would have judgment; but in this case there could be no judgment until the defendant was brought up. In the case of *R. v. Holt* (5 T. R. 436), it was held that if after the reading of the Judge's notes it should appear that justice had not been done, the Court would grant a new trial.

Their lordships, the Judges, then conferred together for some time.

Lord CAMPBELL C. J.—Great inconvenience would result from the introduction of the practice proposed, but, as there has been no general rule laid down, the Court will not shut out the defendant from making his application; but it must be understood that, in future, unless an intimation is given within the first four days of term, it will be too late.

Sir *A. Cockburn* then proceeded to move for a new trial on the grounds intimated. At the trial it was proposed to put in evidence the *Dublin Review* for

(*a*) See *ante*, p. 85, 89.

June 1850 in order to shew that the charges contained in the libel had been published a considerable time before the publication of the libel, with specific references to facts and dates; to shew that the prosecutor had had ample opportunity of meeting the charges, and also to shew that those charges had not been got up, after the publication of the libel, for the justification of Dr. *Newman*. The proposed evidence was rejected by the Lord Chief Justice. It ought to have been admitted.

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Lord CAMPBELL C. J.—The issue was, whether the charges were true or false, and I thought, at the time, that it would be unfair to the prosecutor that, upon that issue, evidence should be admitted to shew that those charges had been made against him at a prior time. Such evidence might have made a wrong impression on the minds of the jury.

Sir A. Cockburn. There was a conflict of evidence between Dr. *Achilli* and the other witnesses, and, in weighing the conflicting evidence, it was worthy of the consideration of the jury that Dr. *Achilli* had been acquainted with the charges contained in the *Dublin Review*, and yet had submitted to them.

ERLE J.—Do you put it as an universal proposition that the publication of a former libel is admissible in evidence as a justification of a subsequent one?

Sir A. Cockburn. No, but the evidence was admissible to shew which side was worthy of credit; and to shew that the prosecutor had tacitly acquiesced in the truth of the charges advanced in the libel.

ERLE J.—That argument would apply to every libel previously circulated containing the same imputations, the publishers of which had not been prosecuted.

COLERIDGE J.—I am entirely of the same opinion

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with Lord CAMPBELL upon this point;—the question was, the truth of the charges. The statements of third parties were not evidence. It has been said that it was probable that this libel was true, because another libel had been published by another person. Upon that principle it might have been argued that the statements in the *Dublin Review* were true because they had appeared previously in some other publication. Such evidence is far too vague to be received. The fallacy of the learned counsel's argument consists in the prosecutor's alleged "submission" to the previous libel. The utmost that can be said is that he did not prosecute the parties. But that might have arisen from various considerations. He might not be able to fix on a particular person, or upon any one of character, or he might be prevented from proceeding by his poverty, or by a variety of other circumstances. Beside, it is not always considered expedient to institute proceedings in respect of the first charge.

WIGHTMAN J.—If the defendant were at liberty to give evidence for the purpose of shewing that a similar libel had been previously published in other works, and that no prosecution was instituted against the publishers, and thus leading to an inference that the charges in the libel were true, it would lead to inquiries which would hardly be satisfactory; and I think such evidence would be infinitely too vague.

Sir A. Cockburn. In the next place the jury were misdirected in respect to the document produced from the Court of the *Holy Office* at *Rome*. It was a document, coming from the proper office for framing a judgment of that Court, and issued under the seal of the Court, and must be taken to be *prima facie* evidence of the truth of the facts which it contained.

The learned counsel here read the document (*a*), which was as follows:—

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(*a*) The following translation of the above was given in evidence on the trial:—

“ I, the undersigned notary of the Holy Roman and Universal Congregation of the *Inquisition*, do testify that after a complete investigation of the proceedings instituted in the Holy Office against Father *Hyacinth Achilli*, priest, religious professor of the Order of Preachers, it is proved from the same acts that the said *Achilli*, having been examined by the established authorities confessed himself guilty of having held carnal intercourse whilst he was living in the monastery of *Viterbo* with many women; also of having deflowered another, who was a virgin, in the city of *Mount Faliscue*; and of having carnally known two other women at *Capua*. Moreover, it is discovered that he made another girl at *Naples* a mother; and that the Superior of the Order of Preachers paid fifty scudi to another woman who had been corrupted by the same *Achilli*, in order to make amends for the injuries done. Lastly, I attest that on account of the crimes of the above-named and other crimes, of which mention is made in the acts, after mature and deliberate examination of the heavy charges resulting from the acts, after having weighed the charges put forth, and considered other matters according to custom, and after having mercifully accepted the confession of the accused himself, and of his own declaration of the following tenor:— ‘I do not ask not to be chastised;

nay, rather, I desire to be severely dealt with on my own showing, according as justice demands. I will receive with resignation whatever punishment may be determined upon, and supposing there were wanting sufficient reason for proceeding with greater rigour, I desire that confession be considered sufficient grounds for punishing me as the said tribunal shall think best.’ Their Eminences the Inquisitors General, on *Wednesday, June 16th, 1841*, in the Convent of *Santa Maria Supra Minerva*, decreed that the accused Father *Hyacinth Achilli*, after having been for ever suspended from the celebration of the sacrifice of Mass and for ever disabled from any sort of direction of souls, and preaching the Word of God, and deprived of active and passive voice in the government of his Order, and after having had salutary penances imposed upon him, be condemned to remain for three years in some religious house of his Order of the most strict observance,

“ Given in testimony of all these facts from the Chancellor’s Office of the *Holy Office*, on this day 22nd *September, 1851*. ”

The instrument was sealed at the signature with a large seal, bearing the insignia of the triple crown supported by *St. Peter* and *St. Paul*, &c., with these words on the margin, “ *Sigil S. Roman. et Univers. Inquisitionis*,” in *Roman capitals*. At the foot it was stamped with the seal of the *British Consulate, Rome*.

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“Testor ego infrascriptus notarius S. Congregationis Romanæ, et Universalis Inquisitionis, quod perquisitis actis assumptis in S. Officio contra sacerdotem P. *Hiacynthum Achilli* religiosum professum ordinis Prædicatorum, constat ex eisdem actis, ipsum *Achilli*, constitutis judicialibus excussum, fuisse reum confessum de carnali copula, dum in cœnobio *Viterbiensi* moraretur, cum pluribus fœminis habita, item de defloratione alterius virginis in civitate *Montis Falisci*, aliasque duas mulieres *Capuæ* carnaliter cognovisse. Eruitur quoque aliam puellam *Neapoli* matrem redditisse; ac superiorem ordinis Prædicatorum scutato quinquaginta alteri fœminæ ab eodem *Achilli* corruptæ pependisse ad damna illata sarcienda.

“Denique fidem facio, quod ob memorata crimina, et alia de quibus in actis maturo prius discusso examine gravaminum ex actis resultantium, perpensis defensionibus, aliisque ex more consideratis, nec non benigne excepta ipsius inquisiti confessione, ejusdemque declaratione sequentis tenoris:—‘*Non chiedo di non esser castigato, auzi amo—che si proceda severamente sul conto mio in quel modo la giustizia esige. Riceverò, con rassig-nazione qualunque disposizione venga emanata, ed ove mancasse qualche ragione a procedere con più rigore, la mia confessione sia bastante a punirmi come meglio cre-derra il S. Tribunale.*’—Emi. Inquisitores Generales, Fer. IV., die 16 Junii, 1841, in *Conventu S. Mariae supra Minervam* decreverunt: Inquisitus P. *Hiacynthus Achilli*—prævia suspensione perpetua a celebrando sacrificio *Missæ*, inhabilitatione perpetua ad quamcumque directionem animarum, et ad Verbi Dei prædicacionem, nec non privationis vocis activæ ac passivæ, et impositis pœnitentiis salutaribus, damnatur ad mandendum per triennium in aliqua domo Religiosa sui ordinis strictioris observantiae.

"In quorum fidem Datum ex Cancellaria S. Officii
hac die 22 *Septembris*, 1851.

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"ANGELUS ARGENTI,

"S. Rom. et Univ. Inquis., Notus.

"Testis, fr. VINCENTIUS LEO SALLUA, O.,

"Præd. 1. Socius S. R. Inquis.

"Witness, JOHN GORDON,

"Cong. Orat. Presb. *Birmingham*.

"Witness, NICHOLAS DARNELL,

"Cong. Orat. Presb. *Birmingham*.

"Sworn before me at *Rome* this 17th day

of November, 1851.

"JOHN FREEBORN,

"British Consular Agent, *Rome*."

Sir A. Cockburn. The grounds alleged for the judgment must be taken to be a part of the judgment, and ought to have gone to the jury as evidence of the truth of the facts.

Lord CAMPBELL C. J.—If I ought to have told the jury that this document was *prima facie* evidence to prove the facts, I was wrong. It was evidence only of the judgment. This was a peculiar document; the recital was not made by the Court.

COLERIDGE J.—Suppose there were no other evidence, would that document be evidence to prove the facts?

Sir A. Cockburn. It was not conclusive evidence, but was *prima facie* evidence of the facts. It was put to the jury as the statement of an unauthorized individual, and they were told that it was more probable that Dr. Achilli was suspended for heresy than, as the document alleged, for immorality.

COLERIDGE J.—The words of the document are—
"ob memorata crimina et alia."

Lord CAMPBELL C. J.—The great defect of the document is that the *ratio decidendi* is not specifically stated.

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Sir A. Cockburn. The judgment could not be separated from the reasons which preceded it. Though the document was not conclusive as to the truth of the facts, it was conclusive that the Court proceeded upon the grounds alleged.

The learned counsel then proceeded to comment, at great length, upon all the facts of the case, with a view to shew that the verdict was against the evidence, and reviewed transactions deposed to as having taken place at *Viterbo, Naples, Capua, Corfu, Zante, Malta, and in England.*

The Court granted a rule *nisi* for a rule to shew cause, on the ground that the verdict was against the weight of evidence, and upon that ground only.

On the 20th, 21st, and 23rd January, A.D. 1853, this rule was argued before Lord CAMPBELL C.J., COLERIDGE J., ERLE J., and WIGHTMAN J.

Sir F. Thesiger, Sir F. Kelly, and Ellis for the Crown. *Sir A. Cockburn* (Attorney General) (*a*), *Wilkins Serjt., Bramwell Q.C., Addison and Badeley* for the defendant.

Sir F. Thesiger shewed cause against the rule *nisi* for a new trial (*b*). *First.* He observed that the rule had been obtained on the ground that the verdict was contrary to the weight of evidence; and he gathered from expressions which had fallen from the Court at the time the rule was applied for, that the majority of the Court were of opinion that the evidence on some of the matters of inquiry preponderated in favour of the defendant.

(*a*) In the interval between the application for a rule *nisi* for a new trial and this argument, *Sir A. Cockburn* succeeded *Sir F. Thesiger* as Attorney General.

(*b*) The observations of *Sir F. Thesiger, Sir A. Cockburn*, and of the

other learned counsel in the case who addressed the Court in the course of the argument, on the conflict of evidence and the testimony given by the various witnesses on the trial, are here necessarily omitted.

Lord CAMPBELL C. J.—The Court thought that that was a question which was fit to be discussed.

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Sir F. Thesiger said that he was bound to assume that, on the case as it was then presented to the minds of the Judges, they were of opinion, not that there was a slight inclination of the balance of the evidence, on some of the causes of inquiry, in favour of the defendant, but that that balance so far preponderated against the prosecutor that the Court could not refuse the rule for a new trial. The Judges were constantly in the habit of saying that though they perhaps, might not have come to the same conclusion as a jury on disputed matters of fact, yet as such matters were peculiarly matters for the decision of the jury, they would not interfere with that decision, nor with the functions of the jury, unless they saw very strong reason to believe that the jury had misapprehended the evidence, and had come to a wrong conclusion upon it. The Judges more especially acted on this rule in cases where the Judge who presided at the trial did not express himself dissatisfied with the verdict. Here the Judge who had presided had not expressed any dissatisfaction with the verdict.

Lord CAMPBELL C. J.—I did not express any opinion either one way or the other.

Sir F. Thesiger. *Secondly.* The Court was bound to consider the position in which Dr. *Achilli* stood with respect to all the circumstances of this extraordinary case. Dr. *Achilli* was called upon to answer charges which ranged over a space of twenty-six years, the great majority of which charges concerned matters which were alleged to have occurred in places abroad. It had been said by the Attorney General that Dr. *Achilli* had had previous information of the circumstances of the cases and of the names of the parties to be called as witnesses, as these names had

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been previously published in the *Dublin Review*. But the *Dublin Review* contained none of the names of the persons except those of *Garamoni* and *Coriboni*. The Attorney General had also said that Dr. *Achilli* had in the plea all the information which was necessary to meet the several charges ; but that was not so, for in the plea the names only of the parties were given, and when a summons was taken out before a Judge for the defendant to give the addresses of those parties, that application was opposed by the defendant, and was dismissed with costs. It would be impossible fully to appreciate the difficulties of Dr. *Achilli's* position under such circumstances. Any inquiry which he could have made in *Italy* would be vague and indefinite, and was not likely to meet with much assistance, though it might have had the effect of compromising his friends and embarrassing his case. It was true that those charges were published in the *Dublin Review*, and it was true that Dr. *Achilli* believed that that article was written by Cardinal *Wiseman* ;—but moral conviction was not legal proof. When Dr. *Newman* appeared as an open adversary in the field, Dr. *Achilli* then came forward to vindicate his character, and obtained a criminal information, which he could not have obtained without pledging his oath to the falsity of the charges. *Thirdly*. The defendant's plea of justification was a single plea, but it contained twenty-three different charges against the prosecutor. At the trial no attempt was made to establish many of those charges. With regard, therefore, to that plea, the verdict of guilty must of necessity have been returned by the jury. But although that was the case, and the verdict must stand upon that plea, an application was now made to the Court, for the purpose of inquiring into some of the charges contained in the plea, not for the purpose of getting a different verdict,—for the same

verdict must be returned in the event of a new trial,— but for the purpose of ascertaining what degree of punishment their Lordships ought to award for the offence. The statute 6 & 7 Vict. c. 96, s. 6, allowed defendants to plead in justification that the libellous matter was true, and that it was for the public benefit that it should be published. The Judge or Court were to see in pronouncing sentence, whether or not the offence was aggravated, or otherwise, by the plea, so that the Court could appreciate how far the evidence failed, and how far it did not; yet the Attorney General said the case must be sent back for a new trial. With regard to the charges in the defendant's plea *on which no evidence was offered* (a) (1), in the fourth and fifth charges, it was alleged that Dr. Achilli, in the year 1826, had a faculty to lecture at *Viterbo*, of which faculty he was deprived by the superior of his order, Dr. Velzi, for some misconduct which the superior concealed and suppressed; and that Dr. Achilli, in the year 1826, while a friar of the order of *St. Dominic*, had earned the reputation of a scandalous friar. No proof whatever had been given that Dr. Achilli had been deprived of his faculty to lecture in 1826. The plea referred by name to the person by whom it was said that he had been removed, yet no attempt was made, at the trial, to establish the fact of his removal. Again (2). The seventh, twelfth and twentieth charges in the plea, referred to the case of *Rosa di Allessandris*. The seventh charge alleged that Dr. Achilli had debauched one *Rosa di Allessandris*, then being chaste and unmarried, of the age of twenty-eight years, and on the 1st of *September*, 1833, at *Viterbo*, was found guilty thereof before the Bishop of *Viterbo*. The twelfth charge stated that the

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(a) The points on which Sir F. Thesiger contended that the defendant had wholly failed to give evidence at the trial in proof of his plea, are for convenience, marked (1), (2), (3), and so on.

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place where Dr. Achilli debauched the said *Rosa di Allessandris* was the sacristy of the Church of *Gradi*, *Viterbo*; and the twentieth charge stated that, after Dr. Achilli had debauched the said *Rosa di Allessandris* at *Viterbo*, on the 1st September, 1833, he was obliged to give the sum of fifty scudi (10*l.*) to the father of the young woman as damages; and that by the official reports of the police at *Viterbo* it was declared that Dr. Achilli had given that sum to the father of the young woman as "hush-money." Not the slightest attempt was made to establish these several particulars.

Lord CAMPBELL C. J.—There was some attempt made to account for the absence of evidence on these points.

Sir F. Thesiger. Further (3). The eighth charge stated that, on the 1st of July, 1834, Dr. Achilli debauched a certain other young woman at *Viterbo*, of the age of twenty-four, whose name was unknown to the said Dr. Newman, and then robbed her of her honour. They had discovered this young woman, and ascertained that she was twenty-four years of age, &c., and yet she was described as an anonymous person. But even from the statement made in the plea, it was shewn to have been impossible that Dr. Achilli could have committed the offence imputed to him. The ninth charge (4) in the defendant's plea was to the effect that in the year 1835, Dr. Achilli, at *Viterbo*, and in the neighbourhood, committed other similar sins, and debauched one *Vincenza Guerra*, then being chaste and unmarried, and also another woman, also chaste and unmarried, whose name was unknown, and that he was afterwards at *Rome*, before the *Court of the Holy Office*, or *Inquisition*, found guilty of the said several offences. The defendant had produced a document from the *Inquisition*, which contained a recital by a notary, made in the year 1851, that certain facts respecting Dr. Achilli were extant in the

records of the *Inquisition*. But in that recital by the notary not one word occurred respecting *Vincenza Guerra* by name, but only of anonymous women, and no attempt was made to prove those charges. The learned counsel read the document (*a*), and proceeded. The Attorney General had introduced, irregularly perhaps, the affidavit of Dr. Achilli, on which the criminal information was obtained, observing that Dr. Achilli there stated that he was not deprived of his lectureship, or of his office of confessor, by the *Inquisition*. But Dr. Achilli did not make that statement. The libel having alleged that he was deprived of his faculty to preach and lecture in 1826,—not one word being said as to the *Inquisition*,—what Dr. Achilli said was that he was not so deprived.

Sir A. Cockburn. He said that he had never been prohibited from preaching or hearing confessions.

Sir F. Thesiger. If he had said that he had never been deprived of the faculty of preaching or hearing confessions *by the Inquisition*, that would have been a strong circumstance.

Lord CAMPBELL C. J.—Have you got the words in Dr. Achilli's affidavit respecting the prohibition alluded to in the libel?

Sir A. Cockburn said the words were, “*And this deponent says that he has never been prohibited from preaching or hearing confessions.*”

COLERIDGE J.—That statement is general.

Lord CAMPBELL C. J. said the proceedings of the *Inquisition* shewed that Dr. Achilli, the prosecutor, *had* been deprived of his faculty of preaching and hearing confessions.

Sir F. Thesiger. He never knew of any such decree being pronounced. He was before the *Inquisition*, not for leading a scandalous and dissolute life, but on account of alleged unsound doctrine.

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(a) See the original and translation, *ante*, p. 101.

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Lord CAMPBELL C. J.—It turned out that Dr. *Achilli* was mistaken in supposing that the *Inquisition* had no jurisdiction over the morals of the clergy. It was proved by the testimony of Dr. *Grant* (*a*) that in grave cases they had jurisdiction.

Sir F. Thesiger. It was singular that in the statement of the notary with regard to the proceedings before the *Inquisition* there was not a single name given.

WIGHTMAN J.—Instead of setting out a copy of the record, the notary gave what *he considered* to be the matters established by it.

Sir F. Thesiger. The thirteenth charge (5) stated, that Dr. *Achilli*, being a priest of the Church of *Rome*, at *Rome*, *Capua*, *Naples*, and *Malta*, spoke and taught against the doctrines of the Catholic faith, and also against the laws of morality, and thereby perverted one *Luigi di Sanctis*, one *Fortunato Saccares*, the said *Rosa di Allessandris*, the said *Elena Valente*, and the said *Maria Principia*. But nothing whatever was known about *Luigi di Sanctis*. The twenty-first charge (6) stated that by an official document of the officers of police at *Naples*, which was among the archives of the *Neapolitan* police, the said Dr. *Achilli* was known and reported for habitual incontinency at *Naples*. The documents were referred to, and the depository was pointed out, and he was entitled to say that they might very easily have established the existence of those supposed records in the possession of the police at *Naples*; yet no such evidence had been adduced, and no attempt was made to account for their non-production. The next charge (7) to which he would refer was conveyed in the fifteenth charge in the plea. It stated that Dr. *Achilli* had been dismissed from his office of professor in the *Malta* College for an offence which the authorities could not get themselves to describe. The inference which almost any person

(*a*) A Bishop, lately rector of the *English College* at *Rome*.

would draw from that imputation was that Dr. Achilli had been guilty of an abominable crime.

Lord CAMPBELL C. J.—I do not recollect any suggestion being made at the trial of any such offence as that now mentioned.

Sir A. Cockburn. No such suggestion was ever thought of (*a*).

Sir F. Thesiger said he was glad to hear that explanation, because it would relieve Dr. Newman from the load, which would otherwise rest upon him, of falsely making such a charge against Dr. Achilli. Lastly. If the Court granted a new trial now there would be no limit to the cases in which a new trial might be asked for. If the jury had, improperly, found a verdict the other way, the Court would not then have allowed a new trial for the purpose of criminalizing Dr. Newman. Would their lordships, then, allow a new trial for the purpose of attempting to criminalize Dr. Achilli? If the Court made this rule absolute they would be doing that which they had never done before; they would be interfering with the verdict of a jury, for the purpose of opening another inquiry into the conduct of a person who, surrounded by the gravest difficulties, had already succeeded in establishing his innocence.

Sir Fitzroy Kelly and Ellis followed on the same side.

As there was but one plea of justification containing a great number of charges, in support of many of which the defendant was unable to bring any evidence, it was a matter of certainty that a verdict for the Crown must finally be entered. It would, therefore, be of no use to the defendant to grant a new trial, while it would be unjust to the prosecutor; for, if this were a conspiracy against him, three or four of the

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(*a*) The 15th paragraph of the defendant's plea seems directly at variance with such an inference. The acts for which Dr. Achilli is said to have been dismissed are "the *said* several acts of sin," &c. *hereinbefore mentioned*.

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chains which were now wanting, might be easily supplied, if a new trial were granted. Dr. Achilli had been treated with much unfairness at the trial by the defendant's counsel. Every one knew that Dr. Achilli was the person really put upon his trial in this case; but, nevertheless, the defendant's counsel, taking advantage of the technical form by which Dr. Achilli was, in law, regarded as a witness and not as a party, insisted on his being ordered out of Court. With respect to the document from the *Inquisition* produced at the trial, in strictness it ought not to have been admitted in evidence at all (a). It contained no reference whatever to the names of any persons whom the prosecutor was said to have injured.

(a) 14 & 15 Vict. c. 99, s. 7.
 All proclamations, treaties, and other acts of state of any foreign state or of any *British* colony, and all judgments, decrees, orders, and other judicial proceedings of any Court of justice in any foreign state or in any *British* colony, and all affidavits, pleadings, and other legal documents filed or deposited in any such Court, may be proved in any Court of justice, or before any person having by law or by consent of parties authority to hear, receive, and examine evidence, either by examined copies or by copies authenticated as hereinafter mentioned; that is to say, if the document sought to be proved be a proclamation, treaty, or other act of state, the authenticated copy to be admissible in evidence must purport to be sealed with the seal of the foreign state or *British* colony to which the original document belongs; and if the document sought to be proved be a judgment, decree, order, or other judicial proceeding of any foreign or colonial Court, or an affidavit, pleading, or other legal

document filed or deposited in any such Court, the authenticated copy to be admissible in evidence must purport either to be sealed with the seal of the foreign or colonial Court to which the original document belongs, or, in the event of such Court having no seal, to be signed by the Judge, or, if there be more than one Judge, by any one of the Judges of the said Court, and such Judge shall attach to his signature a statement in writing on the said copy that the Court whereof he is a Judge has no seal; but if any of the aforesaid authenticated copies shall purport to be sealed or signed as hereinbefore respectively directed, the same shall respectively be admitted in evidence in every case in which the original document could have been received in evidence, without any proof of the seal where a seal is necessary, or of the signature, or of the truth of the statement attached thereto, where such signature and statement are necessary, or of the judicial character of the person appearing to have made such signature and statement.

COLERIDGE J.—There never was a more unsatisfactory document from which to draw any conclusion of facts.

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Sir A. Cockburn (Attorney General), in support of the rule for a new trial. The grounds on which the rule was resisted were two:—First, that the verdict was not a verdict against the weight of the evidence:—secondly, that even if the verdict was against the weight of the evidence, there were certain technical grounds on which the rule must be discharged. It must be admitted on the part of the defendant, that there were *parts of the plea of justification which had not been established*; but when the whole case was looked at, those parts were of a very secondary character when compared with those other parts of the plea on which the evidence was abundantly strong. If the Court should be of opinion that the verdict was against the weight of evidence, it was not because in strict technical form there must still be a verdict for the Crown, that it would refuse to grant a rule for a new trial. A technicality of that sort would not prevent the Court from sending the case for reconsideration upon issues on which a verdict had been improperly found against the defendant. If he established to the satisfaction of the Court the proposition that that verdict was, on the plea of justification, against the weight of evidence in the cause, he must be allowed to make the rule absolute. The *Attorney General* then proceeded to travel through the evidence and adverted to a series of transactions, beginning with *Viterbo*, and going through *Naples*, *Corfu*, *Zante*, and *Malta*, to *England*. With respect to the document from the *Inquisition* referred to so often, it was evident that the prosecutor had not only been condemned for misconduct,

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COLERIDGE J.—There is no evidence to shew that the charges were read over to the prosecutor, or that he was examined upon those charges. The confession set forth might refer to his examination upon the charge of heresy.

Sir A. Cockburn. There was his admission in the document.

COLERIDGE J.—It does not say that these statements were made in his presence.

Sir A. Cockburn. The prosecutor admitted that he had been examined, but denied that he was so as to these points.

COLERIDGE J.—The document produced was not the judgment itself. The notary whose certificate it was, said—“*Eruitur*” (a).

Sir A. Cockburn said, if credit was given to the judgment itself, it was clear that Dr. *Achilli* had confessed that he had been guilty of the acts of incontinence alleged. The learned *Attorney General* then adverted to the observations which had been made with respect to the exclusion of Dr. *Achilli* from the Court during the trial. He contended that that exclusion was perfectly justifiable, as Dr. *Achilli* was himself to be the principal witness on his own behalf.

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COLERIDGE J.—Was it not a case out of the ordinary rule, since he was in truth the accused party ?

Sir A. Cockburn. He had not been deprived of any advantage which he was entitled to claim.

Lord CAMPBELL C. J.—He was deprived of the power of instructing his counsel.

Sir A. Cockburn. That was true, but Dr. Achilli could not have suffered on that account ; for his case was, not that the witnesses spoke untruly as to this or that matter, but that he knew nothing whatever of them, and if that was so, he could not have had any instructions to give to his counsel. In conclusion, he said, he was ready to admit that there were parts of the defendant's plea which had not been substantiated.

Lord CAMPBELL C. J.—There were some parts of the case upon which *no evidence* was given, and some parts which were found by the jury *not proved*, but which it was contended by the defendant were in fact established.

Sir A. Cockburn. Thus the case stood. There was no reason why there should not be a new trial. The other side were estopped from saying that there was, by the course they had followed at the trial. They ought to have said, at the conclusion of the defendant's case, that the plea of justification had not been made out, and have insisted upon a verdict for want of evidence. But they did not do so ; and now that they had profited to the utmost by the evidence of the prosecutor, they asked the Court to dismiss the defendant not only as guilty of a libel, but with the additional stigma of having got up and brought forward a false and fraudulent case to support it.

Wilkins Serjt. Bramwell, Q.C., Addison and Badeley, followed on the same side. The document from the *Inquisition* proved that the prosecutor was con-

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Lord CAMPBELL C. J.—The notary who drew up the instrument stated in it his notion of what was proved by the documents which he found in the *Inquisition*. This document was distinguishable from a judgment of the Court of Admiralty, which was *in rem*, and conclusive against all the world. This was a judgment *in personam*.

The Lord Chief Justice then adverted to the construction of the statute 6 & 7 Vict. c. 96 (*a*). Before the act passed the truth of a libel could not be given in evidence. But the statute came, and it provided that the truth of a libel might be proved on certain conditions, namely, that there should be a plea alleging the truth of the libel, and that its publication was for the public benefit. There was also power given to the prosecutor to reply generally *de injuria*, that the defendant published the libel of his own wrong, and without the cause alleged ; and it required the defendant to prove the *whole* of his plea in order to be entitled to a verdict—*viz.*, that the libel was true, and that its publication was for the public benefit. If he failed in either one of those points the verdict must be given against him. But then the law perceived that there might be a failure to prove the whole truth of the libel, and yet that there might be circumstances which might either mitigate or aggravate the publication ; therefore, by the sixth section (*b*), it authorized

(*a*) An Act to amend the Law respecting Defamatory Words and Libels.

(*b*) 6 & 7 Vict. c. 96, s. 6. And be it enacted, That on the trial of any indictment or information for

a defamatory libel, the defendant having pleaded such plea as herein-after mentioned, the truth of the matters charged may be inquired into, but shall not amount to a defence, unless it was for the pub-

the Court, in passing sentence, to see whether there was anything in the plea of justification, or in the evidence given under it, which either mitigated or aggravated the case. That function was cast upon the Court, not upon the jury. According to that construction of the statute, the jury had no function to find whether *one of the parts* of the plea only was established. If the whole of the plea was not proved, the necessity was cast upon the jury to find a verdict for the prosecution; and then the duty was cast by the law upon the Court, to say what effect should be given to the partial proof of the plea. It might be that it would be the duty of the Court to look at the evidence in the same way as if it were brought before it upon affidavit. But, if the jury were bound to find their verdict upon the whole plea, it was difficult to say that a new trial ought to be granted.

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Cur. adv. vult.

lic benefit that the said matters charged should be published; and that to entitle the defendant to give evidence of the truth of such matters charged as a defence to such indictment or information it shall be necessary for the defendant, in pleading to the said indictment or information to allege the truth of the said matters charged in the manner now required in pleading a justification to an action for defamation, and further to allege that it was for the public benefit that the said matters charged should be published, and the particular fact or facts, by reason whereof it was for the public benefit that the said matters charged should be published, to which plea the prosecutor shall be at liberty to reply generally, denying the whole thereof; and that if after such plea the defendant shall be convicted on such indictment

or information it shall be competent to the Court, in pronouncing sentence, to consider whether the guilt of the defendant is aggravated or mitigated by the said plea, and by the evidence given to prove or to disprove the same: Provided always, that the truth of the matters charged in the alleged libel complained of by such indictment or information shall in no case be inquired into without such plea of justification: Provided also, that in addition to such plea it shall be competent to the defendant to plead a plea of Not Guilty: Provided also, that nothing in this act contained shall take away or prejudice any defence under the plea of not guilty which it is now competent to the defendant to make under such plea to any action or indictment or information for defamatory words or libel.

1853. On the 26th *January*, A. D. 1853, the judgment of the Court was delivered.

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Lord CAMPBELL C. J.—We are of opinion that in this case the rule for a new trial ought to be discharged. The defendant has pleaded two pleas to the information, and we think that on both pleas the verdict must stand for the prosecution. The defendant having admitted the publication of the libel, and that it contains defamatory charges against the prosecutor, there is no defence under the plea of “not guilty.” The application to the Court rests upon the finding of the jury respecting the second plea, which alleges the truth of the matters charged in the libel against the prosecutor, and “that it was for the public benefit that the said matters charged should be published.” The plea is framed upon the recent statute, 6 & 7 Vict. c. 96, s. 6. Before that enactment the truth of the charges contained in a libel was no defence to an indictment or criminal information for publishing it. The truth could not be given in evidence under a plea of “not guilty,” and no special justification on the ground of truth could be pleaded. It was even said that “the greater the truth the greater the libel.” The Legislature, thinking that such a maxim was misapplied, brought discredit on the administration of justice, and that, under certain guards and modifications, the truth of the charges might advantageously be inquired into, and ought to be permitted to constitute a complete defence, passed the statute referred to. But this statute provides that “to entitle the defendant to give evidence of the truth of such matters charged as a defence to an indictment or information, it shall be necessary for the defendants, in pleading to the said indictment or information, to allege the truth of the said matters charged, and further to allege that it was for the public

benefit that the said matters should be published, to which plea the prosecutor shall be at liberty to reply generally, denying the whole thereof." Thus it is quite clear that when the prosecutor has replied to such a plea, "that the defendant wrongfully published the libel without the cause alleged," and issue has been joined upon this replication, the prosecutor is entitled to a verdict, unless the defendant proves, to the satisfaction of the jury, the truth of all the material allegations in the plea. The only function allotted to the jury is to say whether the whole plea is proved or not. If they find that it is, the defendant is acquitted. If they think that it is not, they are to declare that the defendant "wrongfully published the libel without the cause alleged," and he is convicted. The jury are then *functi officio*; and the Legislature did not contemplate that any question would be put to them as to how much of the plea was proved, if the whole was not proved, for without proof of the whole, a conviction must take place, to be followed by a sentence. Nevertheless, the Legislature wisely thought that, although under such circumstances sentence must be passed, the just measure of punishment may materially depend upon the unsuccessful plea of justification, and the evidence given under it. In some cases the defendant may maliciously plead such a plea when he has no substantial evidence to support it; or he may try to support it by false evidence. On the other hand, he may have had reasonable ground for believing that he could prove the whole of it, and he may have adduced sincere witnesses to substantiate a part of it, while, without default, of his own, a material part of it is not substantiated by legal proof. Where there has been a conviction after a plea of justification, what course is to be followed, so that justice may be done, and a due measure of punishment meted

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out according to the real guilt of the defendant? It is quite clear that the Legislature refers every-
thing to the Court alone, after the finding of the jury upon the question whether the whole plea is proved; for it has enacted "that if after such plea the defendant shall be convicted on such indictment or information, it shall be competent to the Court, in pronouncing sentence, to consider whether the guilt of the defendant is aggravated or mitigated by the said plea, and by the evidence given to prove or to disprove the same." Such being the existing law upon the subject, let us apply it to the present case. The defendant's plea of justification complies fully with the condition of the statute, for it alleges the truth of all the criminatory matters charged in the libel (amounting to twenty-three distinct charges), and further alleges that it was for the public benefit that all the said matters should be published. The prosecutor replied, denying the whole of the plea, and thereupon a single issue was joined. After much evidence had been given on both sides, the jury expressed their opinion that only one of the charges mentioned in the plea was proved to their satisfaction, and as to the issue joined on this plea, the verdict was accordingly entered for the prosecution. The counsel for the defendant, in arguing the rule for a new trial, hardly found any fault with the opinion expressed by the jury as to a considerable number of the charges mentioned in the plea, several of these being of a very grave nature, such as the seventh—"that the prosecutor did, at *Viterbo*, debauch, seduce, and carnally know *Rosa di Allessandris*, then being a chaste woman, and then and there robbed her of her honour, and that he was found guilty of having so debauched, seduced, and carnally known her and robbed her of her honour, before

Bishop *Pianetti*, Bishop of *Viterbo*." So the eighth charge—"That the prosecutor did debauch, seduce, and carnally know a certain other woman, then being chaste and unmarried, whose name the defendant was unable to ascertain, and that he also robbed this woman of her honour." So the ninth charge,— "That the prosecutor, at *Viterbo*, and elsewhere in the neighbourhood of that place, did commit sins similar to, or worse than, the said sins and offences hereinbefore mentioned." So the tenth charge—"That the prosecutor, being then a friar of the order of *St. Dominic* at *Capua*, did debauch, seduce, and carnally know a certain other woman, then being chaste and unmarried, whose name is unknown to the defendant, and robbed her of her honour." So the fifteenth charge—"That the prosecutor had been dismissed from the college of *Malta* (among other things) for offences which the authorities are unwilling to state or describe, and which they have hitherto forborene to state or describe, and cannot get themselves to describe specifically." So the twentieth charge—"That after the prosecutor had so debauched and carnally known and robbed of her honour the said *Rosa di Allessandris*, he was obliged to give a large sum of money to the father of the said last-mentioned young woman as hush-money, and by way of compensation for the damages and loss of services of the said father, and that by the reports and documents of the police at *Viterbo*, it was declared that the prosecutor had so given the said money as such hush-money." So the twenty-first charge—"That in and by certain official documents of the police at *Naples*, being amongst the archives of the said *Neapolitan* police, the prosecutor was reported and declared to be known for habitual incontinency." In support of some of these charges no evi-

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the jury were entitled to find a verdict to be entered on the record for the defendant on any part of the libel, covered by a corresponding part of the justification, which they find to be proved. But the argument proceeds on a fallacious assumption. It has uniformly been held that even in a civil action for a libel, the plea of justification is one and entire. It raises only one issue, and unless the whole plea is proved, that issue must be found for the plaintiff. Some difference of opinion has prevailed as to how far a partial proof of the justification ought to operate in reduction of damages, but all authorities agree that there can be no partial finding for the defendant on the ground that the justification is partially established. In a criminal prosecution for a libel had liberty been given by the Legislature to plead the truth as a defence, without any special direction as to the proceedings in case the whole plea is not proved, the jury could have had no right to find that a part of the justification is proved, for there are no damages to be assessed, and the sentence to be pronounced rests exclusively with the Court. But all doubt upon this subject is removed by the express enactment that wherever there is a conviction after a plea of justification "the Court, in pronouncing sentence, shall consider whether the guilt of the defendant is aggravated or mitigated by the plea, and by the evidence given to prove or disprove the same." The Court is to consider the evidence on the one side and on the other, and to form its own conclusion, whether it aggravates or mitigates the guilt of the defendant. By that conclusion the sentence is to be regulated, and not by any declaration of the jury as to the credit which they think ought to be given to the witnesses examined. It is quite clear that the opinion expressed by the jury on any particular parts of the

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1853. plea (the whole not being proved) could not be entered on the record. It might be reported by the Judge who presides at the trial to the Court by whom the sentence is to be pronounced ; but still the Judges, in deliberating upon the sentence, are bound to form their own opinion upon the evidence, and, as they think that it aggravates or mitigates the guilt of the defendant, they are to apportion the punishment accordingly. The evidence as it appears on the notes of the Judge who presides at the trial comes in the place of the production of affidavits, in aggravation or mitigation of punishment when sentence is to be pronounced. Under these circumstances, how can we set aside the verdict and grant a new trial ? This course is to be adopted only where some issue has been improperly found, and a different verdict may be expected. But here it is admitted that the issue has been properly found, and that the jury must again find that the defendant wrongfully published the libel, without the cause or justification which he has alleged in his plea. Again the defendant must come before us for sentence, and the evidence to be considered by us in measuring out the punishment would (as far as we know) be in no respect different from that given upon the trial which has already taken place. For these reasons, a new trial must be refused, and sentence must be pronounced ; but, in pronouncing sentence, we shall, in the discharge of our sacred duty, consider whether the guilt of the defendant is aggravated or mitigated by the plea, and the evidence given to prove and to disprove it. In this manner we conceive that the intentions of the Legislature will be strictly fulfilled, and the ends of justice will be fully answered.

Rule *nisi* for new trial discharged.

Sir F. Thesiger then applied for the costs of the

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rule so discharged. The statute (*a*) gave the prosecutor his costs in cases of criminal information for libel, where the defendant was found guilty; but it was necessary to apply to the Court for the costs of opposing a rule for a new trial.

The Court, however, having intimated a doubt whether that was the proper time to make the application, the question as to the costs of the rule was deferred.

On the 31st *January*, A. D. 1853, *John Henry Newman*, D. D., was brought up for judgment before Lord CAMPBELL C. J., COLERIDGE J., WIGHTMAN J., and ERLE J., when Sir *F. Thesiger* (Sir *F. Kelly* and *Ellis* with him), prayed the judgment of the Court upon the defendant.

Sir *A. Cockburn*, Attorney General, (*Wilkins Serjt.*, *Bramwell Q. C.*, *Addison*, and *Badeley*, with him), put in affidavits, made by the defendant and other persons, in mitigation of punishment.

An affidavit made by the defendant, *John Henry Newman*, D.D., was then read. It set forth that before the publication of the libel, stated in the criminal information, he believed the charge against the prosecutor to be true, and stated the grounds for such belief. He recited, among other matters, parts of the *Report of the Malta Protestant College*, of the date of 2nd December, 1850, which report was signed by Lord *Ashley*, M. P., now the Earl of *Shaftesbury*, the Earl of *Waldegrave*, *G. A. Hamilton*, M. P., and seven other clergymen and gentlemen, which stated the ground of Dr. *Achilli's* dismissal from his office in that college, was "conduct which they could not consider consistent with moral rectitude;" that Dr. *Achilli* had placed himself in a most equivocal position, by resisting investigation into the charges

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affecting his *Italian* friends, at the same time that he was himself the object of many grave personal accusations. The affidavit also recited parts of another report of the *Malta* Protestant College, intitled “*Second Report of the Committee respecting the removal of Dr. Achilli from the College,*” in which the committee say, that they feel bound to pronounce the said Dr. *Achilli*, “on evidence which cannot be gainsayed, a man guilty of advancing and repeating untruths, first in regard to the cause of his dismissal, and next in regard to his services in the *Malta* College;” alleging that he had practised “double dealing,” and that he had “forfeited his character for truth.” The affidavit further stated, that the said *Second Report* contained the following passage:—“The committee consider that they have so clearly established how little Dr. *Achilli* has been guided by a sense of Christian faith and integrity, and how little he is entitled to be believed, that they do not think it necessary to notice at length his misrepresentations on several minor points on which it would be easy to supply a refutation;” and that such *Second Report* was also signed by Lord *Ashley*, M.P., now the Earl of *Shaftesbury*, the Earl of *Waldegrave*, *G. A. Hamilton*, M.P., and seven other gentlemen and clergymen.

The affidavit of the defendant then went on to state that on the 1st or 2nd of *February* 1852, he received from *Viterbo* a communication whereby the deponent was credibly informed that the said *G. G. Achilli* had seduced, debauched, and carnally known the said *Rosa di Allesandris* (a).

Sir *F. Thesiger* objected. The defendant had no

(a) See 7th, 12th, 13th, and 20th paragraphs in the defendant's plea of justification, pp. 90, 91, 93.

right to make such statements in his affidavit as he was making ; they ought not to be received.

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Lord CAMPBELL C. J.—The affidavit is receivable in mitigation of punishment.

Sir F. Thesiger. Dr. *Achilli* will have no opportunity of answering what the defendant is now alleging.

Sir A. Cockburn. The defendant wished to put the Court in possession of the evidence laid before him when he put the plea of justification on the record.

Lord CAMPBELL C. J.—This is not an affidavit of the truth of the charge (*a*), but one to shew that there was reasonable ground for the defendant in bringing it.

COLERIDGE J. thought that what followed in the affidavit occurred after the plea was pleaded, and could not be admissible to shew the truth of the charge. The affidavit stated that, in *January* 1852, the defendant received an affidavit from *Rome*, from a person who stated that he had evidence to prove the charges.

Sir F. Thesiger. The plea was pleaded in the previous *December*.

Sir A. Cockburn. But it was pleaded without the names of the parties ; it was demurred to ; and then it was recast, and the names were added.

The affidavit of *James Vincent Harting*, No. 24, *Lincoln's Inn Fields*, county of *Middlesex*, gentleman, was then put in. On reference to a conversation between the deponent and the above mentioned *Rosa de Allessandris* in which it was represented that she had stated to the deponent that she had been seduced by Dr. *Achilli*,

(*a*) In the case of *Rex v. Burdett*, 4 B. & Ald. 314, it was held that affidavits were receivable which stated that he had derived certain statements in the libel of the pub-

lication of which he was convicted, from a newspaper, in mitigation of punishment, but not as proof that the facts contained therein were true.

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Sir *F. Thesiger* said he could not refrain from again interposing. The course pursued in putting in affidavits containing statements so prejudicial to Dr. *Achilli* was most unfair towards that gentleman. The most serious accusations were preferred against him in a new form, which he had no possible means of answering. He objected to the reception of such affidavits.

Lord CAMPBELL C. J.—The affidavits are receivable in mitigation of punishment. They are tendered for the purpose of shewing an excuse for having made charges, in support of which the defendant did not produce evidence at the trial.

Sir *F. Thesiger*. The woman herself ought to have been produced at the trial; or an application to defer the trial, in consequence of her absence, should have been made on the part of the defendant.

Sir *A. Cockburn*. The Court, by the act of Parliament is to consider whether the guilt of the defendant is aggravated or mitigated by the plea which he had put on the record. Now this affidavit is tendered to shew the grounds on which he had put forward certain statements in the plea.

Lord CAMPBELL C. J.—Suppose a justification as to *A. B. & C.* At the trial no evidence is given in support of the justification as to *A.* I apprehend that affidavits are receivable to explain why the defendant pleaded a justification as to *A.*, in order that the Court may consider, under the act of Parliament, whether the guilt of the defendant was aggravated or mitigated by the plea.

ERLE J.—The evidence is admissible to shew that the defendant had good ground to plead the plea of justification. In a civil action the defendant's pleading a plea of justification is frequently evidence of malice. Now, the Court is to look at the plea and

see whether it aggravated or mitigated the offence. If it was pleaded without any evidence to support it, that would be evidence of malice and matter of aggravation; but if pleaded in a *bonâ fide* belief that could be supported by evidence it would be a matter in mitigation. The affidavit therefore is admissible to shew that the defendant believed that he had ground for pleading the plea.

WIGHTMAN J.—The libel contained no names, and the plea, as originally pleaded, contained no names. It was demurred to upon the ground that the charges were not specific. Upon that the names were added. One question for the Court now is, whether the offence was aggravated or mitigated by the plea. The affidavit asserts a reason why the names of the parties were put in.

COLERIDGE J. said he entirely agreed with his brethren as to the principle; he only differed from them as to the facts.

Lord CAMPBELL C. J.—The statute says it shall be competent for the Court, in pronouncing sentence, to see whether the offence is aggravated or mitigated by the plea and by the evidence;—the affidavit is therefore admissible to shew how it was that a charge, wholly unsupported by evidence, was put on the record.

The affidavit was then read. It was to the following effect:—“That he was employed to collect evidence on behalf of the above named defendant in *Italy* and *Malta*, which he visited for that purpose during the months of *December* 1851 and *January* 1852; that he had no object and no instructions but to elicit the truth in every instance and that no attempt was ever made or contemplated by him or as he verily believes by any other person whomsoever either in *England* or *Italy* or *Malta* or elsewhere on the part of the said

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defendant to suborn witnesses or to present any other than a true and faithful statement of the several facts as they occurred. That from the information collected by this deponent he verily believed that all the charges mentioned or referred to in the said defendant's plea so far as they relate to the places visited by this defendant and comprised in this deponent's investigation were capable of being proved and would have been proved on the trial of this information if the attendance of witnesses could have been procured. That in the month of *December* 1851 he saw and conversed with *Rosa de Alessandris* now the wife of *Dominico de Carolis* at *Viterbo* and afterwards in *Rome* and that she then and there stated to him that she had been seduced by the above-named *G. G. Achilli* and had become pregnant by him had given birth to a child which died shortly afterwards. That the said *Rosa de Alessandris* made a deposition to that effect in *Rome* before a Judge of the Criminal Court there but she absolutely refused to come to *England* by reason of her being then pregnant and that she could not leave her husband and family for the period she might be required to stay in *England*."

Another affidavit made by *James Vincent Harting*, was then read. It was as follows:—"That the paper writing marked C 7 now produced and shewn to him was delivered to him at *Naples* at the office of the minister of ecclesiastical affairs for the kingdom of the two *Sicilies* and is a true copy of an original document then and as this deponent verily believes still remaining in the said office the same having been carefully examined and compared by him with the said original and that the said original was produced to this deponent by the said minister the *Chevalier Ferdinando Troja* and that the signature

"Cav." *Ferdindo Troja* set and subscribed to the said paper writing as the minister certifying the same is of the proper handwriting of the said *Chevalier Ferdinand Troja* who wrote the same at the request and in the presence of this deponent And this deponent saith that he verily believes and has no doubt whatever that the document so produced to him as aforesaid was and is the original which it purports to be and that the facts therein stated were and are true (a)."

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The writing annexed to the affidavit being about to be read,—

Sir *F. Thesiger* strongly objected to its reception. The effect of admitting such documents would be again to put Dr. *Achilli* on his trial without giving him a chance of being heard in his defence.

The Judges having conferred together for a few minutes, Lord CAMPBELL C. J. said they were unanimously of opinion that the paper was inadmissible.

Other affidavits were then read, and the counsel for the defendant and the Crown having been heard, the defendant was sentenced (b) to pay a fine of One hundred pounds to the Queen and to be imprisoned in her Majesty's prison till the fine was paid.

Sir *F. Thesiger* then called the attention of the Court to the question of costs, to which he had adverted when the *rule nisi* for a new trial was discharged. His application was that the prosecutor should be allowed the costs of the argument on the application for the new trial.

Lord CAMPBELL C. J.—The act of Parliament (c) merely says, that if the issue be found for the prose-

(a) See the 21st paragraph in the plea of justification, p. 93.

(b) The sentence of the Court was pronounced by COLERIDGE J.

(c) 6 & 7 Vict. c. 96, s. 8, And be it enacted, That in the case of any indictment or information by a private prosecutor for the publica-

1853. **Doctor NEWMAN'S Case.** **cutor he shall be entitled to recover from the defendant the costs sustained by the prosecutor *by reason of such plea*. The costs will be taxed in the usual way, and the master will use his discretion as to the costs sustained by the prosecutor in respect of the plea of justification ; and then it will be open to either party to raise this question before the Court. At present the Court cannot interfere.**

tion of any defamatory libel, if judgment shall be given for the defendant, he shall be entitled to recover from the prosecutor the costs sustained by the said defendant by reason of such indictment or information ; and that upon a special plea of justification to such indictment or information, if the issue be found for the pro-

secutor, he shall be entitled to recover from the defendant the costs sustained by the prosecutor by reason of such plea, such costs so to be recovered by the defendant or prosecutor respectively to be taxed by the proper officer of the Court before which the said indictment or information is tried.

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RICHARD SILL v. THE QUEEN.

The indictment charged that the defendant by false pretences did unlawfully obtain from B. two Bills of Exchange, for the payment of 150*l.* respectively,

and one Bill of Exchange for the payment of 250*l.*, with intent to cheat and defraud him the said B. : Held, bad on writ of Error, as it did not appear who was the owner of the property so alleged to have been obtained by false pretences ; the stat. 14 & 15 Vict. c. 100, not altering the law, as settled prior to that act, that in an indictment for obtaining money by false pretences it was as necessary to state the ownership of property as in a case of larceny.

(a) See *Reg. v. Sill, ante*, p. 10.

Garden in the county of *Middlesex* Gentleman on the seventh day of *March* in the year of our Lord One thousand eight hundred and fifty-two at the parish of *Saint Martin in the Fields* in the county of *Middlesex* unlawfully knowingly and designedly did falsely pretend to one *Henry Broome* that the said *Richard Sill* had had an interview with the Secretary of State respecting the trial of one *John Broome* the brother of the said *Henry Broome* for certain offences and misdemeanors with which he the said *John Broome* then stood charged and had ascertained from the said Secretary of State that the said *John Broome* would if convicted of the said offences and misdemeanors be transported by means of which said false pretences the said *Richard Sill* did then and there unlawfully obtain from the said *Henry Broome* two Bills of Exchange of the value and for the payment of one hundred and twenty pounds respectively and one Bill of Exchange of the value and for the payment of two hundred and fifty pounds with intent then and there to cheat and defraud him the said *Henry Broome* of the same Whereas in truth and in fact the said *Richard Sill* had not had an interview with the Secretary of State respecting the trial of the said *John Broome* as aforesaid And whereas the said *Richard Sill* had not ascertained from the said Secretary of State that the said *John Broome* would if convicted of the said offences and misdemeanors with which he stood charged be transported to the great damage and deception of the said *Henry Broome* against the form of the statute &c. against the peace &c.

The second count set forth the same pretence, but alleged that the said *Richard Sill* obtained from the prosecutor the sum of twenty pounds, and a cheque for the payment of twenty pounds. The third count

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was similar, but charged that a Bill of Exchange for the value of two hundred pounds, and an order for the payment of money for two hundred pounds had been obtained by him by means of the same pretence.

Errors assigned : That it is not stated that the said several Bills of Exchange, or the said sum of twenty pounds, or the said cheque and order for the payment of money or the said order for the payment of money in the several counts of the said indictment respectively mentioned and therein repectively alleged to have been obtained by the said *Richard Sill* from the said *Henry Broome*, by means of the false pretences therein respecitively mentioned, were, or that any or either of them were, or was, at the said times, when they were respecitively so obtained as aforesaid, the property of the said *Henry Broome*, or of any other person whatever, or that the said *Henry Broome*, or any other person whatever, was at the said times entitled to the possession of, or to demand or receive payment of the same respecitively. That it is not alleged whose property the said several Bills of Exchange, sum of money, cheque, and order for the payment of money, or order for the payment of money in the said several counts respectively mentioned, or any or either of them were or was at the time when they were respectively obtained by the said *Richard Sill* from the said *Henry Broome* as in the said several counts respectively alleged, and that it is consistent with the said indictment that the same were at the time respectively last aforesaid the property of the said *Richard Sill*, or that the said *Richard Sill* was then entitled to the possession of the same respecitively. That it is not alleged that any money was due or secured or remaining unsatisfied upon any or either of the Bills of Exchange, or the said cheque and order for the payment of money or the said order

for the payment of money in the said several counts thereof respectively mentioned at the time when they were respectively so obtained by the said *Richard Sill* from the said *Henry Broome* as in the said several counts is respectively alleged. That the several pretences set forth in the said indictment are not nor are any or either of them sufficient in law to support the said charges in the said several counts in the said indictment respectively contained. That it doth not appear in or by any of the counts in the said indictment how or in what manner the making of the pretences in the said counts respectively set forth, or of any or either of the same pretences was connected with the obtaining or enabled the said *Richard Sill* to obtain from the said *Henry Broome* the said bills of exchange, sum of money, cheque and order for the payment of money and order for the payment of money in the said several counts respectively mentioned or any or either of them (a).

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Joinder in error.

On the 28th of *January*, A. D. 1853, this case was argued on a *concilium* before Lord CAMPBELL C. J., COLERIDGE J., WIGHTMAN J., and CROMPTON J.

Hodgson for the plaintiff in error. *Metcalfe* for the Crown.

(a) The following rule was taken out by the plaintiff in error:—

“*Tuesday*, the eleventh day of *January* in the sixteenth year of the Reign of Queen *Victoria*.

“In the Queen's Bench,”

“*Middlesex*.”

“**RICHARD SILL**, Plaintiff, Error,
against

The **QUEEN**, Defendant in Error.”

“Unless the Crown and attor-

ney of this Court shall join in error with the plaintiff in error within eight days next after notice of this rule to be given to the attorney or agent for the defendant in error and to the solicitor for the affairs of her Majesty's Treasury, let judgment be entered for the said plaintiff in error.

“Side Bar.

“By the Court.”

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Hodgson. The three counts of the indictment are all open to the same objection. They do not state that the bills of exchange and money mentioned were the property of any one. This is an objection fatal on writ of error. It was an objection raised in the case of *Reg. v. Norton*, 8 Car. & P. 196 ; and ALDERSON B., Williams J., *Coltman* J. held that the indictment must be quashed. An indictment under the stat. 7 & 8 Geo. 4, c. 29, for obtaining money under false pretences, it was held is not good unless n addition to the false pretences it contain the requisites of a count for larceny ; and if it do not allege the money, &c. obtained *to be the property of any person*, it will not be sufficient, inasmuch as it could not in that state be pleaded as a bar to a subsequent indictment for larceny, which the offence is made by the proviso in the 53rd section. In a subsequent case the point was raised upon writ of error, and the Queen's Bench gave judgment for the defendant. That case was *Reg. v. Martin*, 8 Ad. & E. 481, which seemed conclusive upon the subject. The defendants were indicted for that they contriving and intending, &c. to cheat and defraud *W. J. H.* of his goods, on &c., at &c., unlawfully did falsely pretend, *G. J.* then and there being an apprentice to the said *W. J. H.*, that &c. (stating and negativing the pretences) ; and that the said *G. M.* and *E.* his wife, by the false pretences aforesaid, did then and there unlawfully, knowingly, and designedly, obtain from the said *W. J. H.* divers goods and merchandizes, that is to say, *six dozen pounds weight of candles of the value of, &c. with intent then and there to cheat and defraud the said W. J. H. of the same*, against the form of the statute, &c. Plea not guilty ; verdict guilty, and judgment of transportation. Error was brought on the judgment, on the ground among others that it was not stated in the indictment that the goods

alleged to have been fraudulently obtained were *the property of any person*. Lord *Denman* C. J., in giving judgment in the case said, "this indictment is clearly bad on the face of it. For aught that appears the defendant may have obtained his own goods. Perhaps he might even do that under circumstances which would be criminal; but *prima facie* it would not be criminal, and the circumstances which rendered it so should be stated. Then is the defect covered by verdict? The act 7 *Geo. 4*, c. 64, s. 21, says—that after verdict the indictment shall be sufficient, if it describe the offence in the words of the statute, and here the indictment does certainly pursue the words of the statute. But it is not enough to state the offence in general terms; the enactment assumes, that the words shall be so employed as to shew that some offence has been committed. In indictments for larceny the ownership of goods is always stated." On the same occasion, *Littledale* J. remarked, "I am certainly of the same opinion. No doubt this indictment would be bad on judgment by default for want of stating whose the property was. Then as to the operation of stat. 7 *Geo. 4*, c. 64, s. 21, after verdict. Stat. 7 & 8 *Geo. 4*, c. 29, s. 53, punishes the obtaining by false pretences any chattel, &c., with intent to cheat or defraud any person of the same. That description is followed in the indictment and the offence is therefore described in the words of the statute. But the subject-matter must be described with the same particular as in a common law indictment. Thus, it would not be enough to charge the stealing in a dwelling-house, the destroying a will, the taking pigeons, without adding whose goods, whose will, whose pigeons." And *Patteson* J., added, "I cannot see how, if we hold such a defect was cured, we could hold that a

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verdict did not cure an omission in an indictment for burglary, of any statement on whose house, or whose goods, the house or goods were."

Metcalfe. I may as well state now that I do not dispute what my learned friend contends for that there are various cases in which it has been held, that it was necessary to state in an indictment for obtaining money by false pretences, who the owner of the property so obtained was. *Reg. v. Norton* and *Reg. v. Parker*, are authorities which I must admit are conclusive, unless the law has been altered by the recent Act 14 & 15 Vict. c. 100.

Lord CAMPBELL C. J.—What section of that act do you rely upon?

Metcalfe. Section 25th.

Lord CAMPBELL C. J.—It was proposed during the passing of the act, that an indictment should be sufficient which said that the defendant obtained money by false pretences without naming any body, or stating what the pretences were. I was against that (a).

(a) *Clauses struck out of the Bill,*
14 & 15 Vict.

"And that in any indictment for obtaining money by false pretences it shall be sufficient to allege that the defendant by false pretences unlawfully and fraudulently did obtain the money or chattel or valuable security which shall form the subject of the charge from some person who shall be named in the said indictment *without particularly setting forth in such indictment the pretences whereby such property was obtained, or the owner of such property, and in like manner in any indictment for attempting to ob-*

tain property by false pretences or for receiving any property obtained by such pretences, it shall not be necessary to specify the pretences or state the ownership of such property."

The above clause seems to have been suggested by Mr. Greaves, but being considered unsafe was struck out by the House of Lords.

The following clause was also expunged, on the ground that it would make an indictment for obtaining money under False Pretences good, without specifying what the pretences were, contrary to the decision of the Judges in *Rex v. Mason*, 2 T. R. 581.

Metcalf. The 25th section of 14 & 15 Vict. c. 100, enacts:—" Every objection to any indictment for any formal defect apparent on the face thereof shall be taken, by demurrer on motion to quash such indictment, before the jury shall be sworn, and not afterwards ; and every Court before which any such objection shall be taken for any formal defect may, if it be thought necessary, cause the indictment to be forthwith amended in such particular by some officer of the Court or other person, and thereupon the trial shall proceed as if no such defect had appeared."

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Lord CAMPBELL C. J.—That section does not touch this objection.

Hodgson. The law as to the necessity of stating the ownership of property in an indictment for larceny and false pretences is not altered. The first section provides that variances may be amended ; but this is not a case of variance.

Lord CAMPBELL C. J.—That is, it empowers the Court to amend variances before verdict.

Hodgson. The statute *assumes* that property must be laid in somebody ; and it enables a Court, in a case where the property was laid as that of *A.* and proved to be that of *B.*, or where the name turned out to be *William John* in place of *John Williams*, to order the indictment to be amended, and not allow the prisoner to be acquitted. Before the act it was held to be as necessary to state the ownership of property in false pretences as in larceny. The law must be

" Whereupon the offence charged in any indictment has been or shall hereafter be created or defined by any statute or subjected to a greater, less or different degree of punishment by any statute, the indictment shall be sufficient to

all intents and purposes whatsoever, if it describe the offence in the words of the statute." See the observations of Lord Denman C. J., and Patteson J., on 7 Geo. 4, c. 64 s. 21. *Rex v. Martin*, 8 Ad. & E 481.

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taken to be settled by *Reg. v. Martin* (*a*) ; now how does the Act 14 & 15 Vict. c. 100, affect the authority of that decision ? The eighth section is the only one that refers to false pretences. It enacts :—that “ From and after the coming of this act into operation it shall be sufficient in any indictment for forging, uttering, offering, disposing of, or putting off any instrument whatsoever, or for obtaining or attempting to obtain any property by false pretences, to allege that the defendant did the act with intent to defraud, without alleging the *intent of the defendant to be to defraud any particular person*; and on the trial of any of the offences in this section mentioned it shall not be necessary to prove an intent on the part of the defendant to defraud any particular person, but it shall be sufficient to prove that the defendant did the act charged with an intent to defraud. It merely says that an intent to defraud any particular person need not be alleged or proved.”

* Lord CAMPBELL C. J.—It goes so far and no farther.

Hodgson. The *corpus delicti* remains untouched. The *corpus delicti* in false pretences is fraudulently obtaining the goods or money the property of some one ; either of *A. B.*, or of some person to the jurors unknown. The eighth section of the statute merely enables you to state a general intent to defraud instead of a particular intent.

WIGHTMAN J.—You say that obtaining money *with intent to defraud* is not enough ?

Hodgson. It is not enough to constitute the offence.

Lord CAMPBELL C. J.—So it was before the act, and so it seems to be at present.

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Hodgson. In illustration of the intention of the Legislature in framing 14 & 15 Vict. c. 100, reference may be made to *Greaves's* edition of the Act (*a*). On the eighth section he remarks, “Before this act passed, it was necessary in these cases to allege that the defendant did the act charged with intent to defraud some particular individual, mentioned in the indictment, and to prove that the defendant did such act with intent to defraud the person so specified. This in most instances led to the multiplication of counts alleging an intent to defraud different persons so as to meet any view the jury might take of the evidence, and sometimes upon the evidence a difficulty occurred in ascertaining whether any person in particular could be said to be intended to be defrauded. This clause is intended to obviate all such difficulties, and it renders it sufficient to allege in the indictment that the forgery or uttering was committed, or the goods obtained with intent to defraud, without specifying any particular person intended to be defrauded, and it likewise renders it unnecessary to prove that the defendant intended to defraud any particular person, and makes it sufficient to prove that he did the act with intent to defraud.” In the precedent too, which he has given in illustration of the act of Parliament (No. 34), he lays the goods obtained by false pretences, as “the goods and chattels of the said *C. D.*”

Lord CAMPBELL C. J.—As Mr. *Metcalfe* admits, that before the act such an objection would have been fatal, it is incumbent on him to shew how the act cures

(*a*) The Lord Chief Justice remarked that Mr. *Greaves* had given most valuable assistance in the preparation of the act.

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the objection. After such solemn decisions, we are bound to decide in favour of the plaintiff in error, unless it can be shewn that the new act has altered the law.

Metcalfe. That according to the decisions before 14 & 15 Vict. c. 100, it would have been necessary to state the ownership of property in a count on false pretences is not disputed. But the defect is cured by the statute. The twenty-fifth section provides, that formal objections to the indictment shall be taken before the jury are sworn and *not afterwards*, and that the Court may order them to be amended at the trial.

Lord CAMPBELL C. J.—Then you must make out that this is a formal defect.

Metcalfe. It is submitted that the objection is only one of form.

CROMPTON J.—Can that be a formal statement which must be laid, and proved as laid?

Metcalfe. This is not like a case of larceny. In larceny the offence is stealing the goods of another person, and it is clearly necessary that the ownership of the goods should be shewn. But in obtaining money or goods by false pretences, the gist of the offence is the fraud (a).

Lord CAMPBELL C. J.—But the Judges have held, that there is no distinction in this respect between cases of false pretences and of larceny; that the same necessity which exists for stating the ownership of property in the one case exists in the other.

COLERIDGE J.—The twenty-fifth section says, the

(a) See the observations of MAULE J. in *Reg. v. Nash*, 2 Den. C. C. 493, 499, 500, 501, where that learned Judge laid it down that a man may be convicted under 14 & 15 Vict. c. 100,

s. 8, of forging and uttering an instrument with intent to defraud, though there is no person in a situation to be defrauded by his act.

Court shall have power to amend the defects mentioned, could this defect be amended?

Metcalfe. It is submitted that this Court of Error may even now amend.

COLERIDGE J.—The section says, “*and thereupon the trial shall proceed.*”

Metcalfe. At all events the defect could have been amended at the trial.

Lord CAMPBELL C. J.—The amendments at the trial are the amendments of variances.

Metcalfe. No doubt the statute is intended to meet the case of mistake in the name of the parties; such as where the property is described as belonging to *Roe*, and it is proved to belong to *Smith*. But it goes farther than that. The twenty-fourth section gives a long list of technical objections which are to be deemed frivolous, and not to affect the validity of the indictment (*a*). The twenty-fifth section must mean some-

(*a*) Sect. 24 of 14 & 15 Vict. c. 100, provides that:—

1. No indictment for any offence shall be held insufficient for want of the averment of any matter unnecessary to be proved.

2. Nor for the omission of the words “as appears by the Record.”

3. Or of the words “with force and arms.”

4. Or of the words “against the peace.”

5. Nor for the insertion of the words “against the form of the statute” instead of “against the form of the statutes,” or *vice versa*.

6. Nor for that any person mentioned in the indictment is designated by a name of office, or other descriptive appellation, instead of his proper name.

7. Nor for omitting to state the time at which the offence was com-

mitted in any case where time is not of the essence of the offence.

8. Nor for stating the time imperfectly.

9. Nor for stating the offence to have been committed on a day subsequent to the finding of the indictment, or on an impossible day, or on a day that never happened.

10. Nor for want of a proper or perfect venue.

11. Nor for want of a proper or formal conclusion.

12. Nor for want of or imperfection in the addition of any defendant.

13. Nor for want of the statement of the value or price of any matter or thing, or the amount of damage, injury or spoil in any case where the value or price or the amount of damage, injury or spoil

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thing beyond that. It must refer to a different class of defects and objections.

Lord CAMPBELL C. J.—Yes: To formal defects apparent on the face of the indictment.

Metcalfe. But these formal defects must be taken to extend beyond such matters as those mentioned in the twenty-fourth section, and to include such a case as the present.

Lord CAMPBELL C. J.—The section may mean other defects *eiusdem generis*.

Metcalfe. The Legislature must have had some motive for adding a fresh section to the act, in these general terms. In the case of *Reg. v. Parker*, 3 Q. B. 792 (*a*), it was held that an indictment for a conspiracy to obtain goods by false pretences was bad, because it did not state to whom the goods belonged.

Lord CAMPBELL C. J.—How do you apply that case to your present argument?

Metcalfe. In this way, that it is evident from the language of Lord *Denman* in giving judgment, that although he felt bound to hold that the indictment was bad, he considered that the gist of the offence was the *conspiracy*. And what is the gist of the offence here?—Obtaining the bills of exchange and money with *intent to defraud*. Suppose the bills of exchange were laid to be the property of *Jones*, and it turned out that they were the property of *Smith*? Suppose even that they were *Sill's* own property, yet if he

is not of the essence of the offence.

Many of these defects were, after verdict, cured under 7 Geo. 4, c. 64, ss. 20, 21, but were still *demurrable*. The above section prevents any objection from being raised in respect of any of the defects enumerated.

(*a*) An averment that the defendants conspired by false pre-

tences to obtain goods from *A*, and in pursuance of such conspiracy fraudulently did obtain the goods from *A.*, and did cheat and defraud *A.* thereof to the great damage of *A.*, was held by the Queen's Bench not sufficiently to state that the goods were the property of *A.*

fraudulently obtained his own property from a bailee with intent to defraud him (*a*), he would be indictable. The intent to defraud therefore is the gist of the offence, and a statement of the ownership of property cannot be regarded as essential.

Lord CAMPBELL C. J.—Your argument goes to this extent, that since the passing of the act, it has become *unnecessary to state in the indictment that the property belonged to anybody*;—that it is enough to say that the defendant obtained property by false pretences with intent to defraud, without saying whose property.

Metcalfe. That the defect is amendable.

Hodgson replied. The authority of *Reg. v. Martin* (*b*) has not been shaken. The act 14 & 15 Vict. c. 100, has not been shewn to apply. In an indictment against a man for destroying a will it must appear *whose will* it was, for it might be his own (*c*). An indictment to be good must state correctly the offence and the subject-matter of the offence. Both are matters of substance, and neither the twenty-fourth nor the twenty-fifth sections of the new act refer to matters of substance. In the case of *Reg. v. Thurborn* (*d*) it was laid down by PARKE B., in delivering the judgment of the Court, that there are cases where no felony is committed by taking goods;—if they belong, for example, to no person. It, therefore, is necessary in order to constitute the offence, that the ownership of the goods

(*a*) See observations of Lord Denman C. J. in *Reg. v. Martin*, 8 Ad. & E. 481.

(*b*) 8 A. & E. 481.

(*c*) The Act 7 & 8 Geo. 4, c. 29, s. 22, provides that “it shall not in any indictment for such offence be necessary to allege that such will, codicil or other instrument is the property of any person or

that the same is of any value.”

Lord Denman C. J., and Littledale J. however, in *Reg. v. Martin* (8 Ad. & E. 481) laid it down with the concurrence of Williams J. and Patteson J., that it was still necessary to say *whose will* it was that was destroyed.

(*d*) 1 Den. C. C. 388.

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stolen, or obtained by false pretences, should be stated. The eighth section of 14 & 15 Vict. c. 100, merely says that in future it shall not be necessary to allege an intent to defraud any particular person, and the Court will not extend it any further.

Lord CAMPBELL C. J.—I am very reluctant to be compelled to yield to this objection. It is admitted that before the statute, it was as necessary to state in an indictment for obtaining money by false pretences, in whom the property was, as in a case of larceny. There are various decisions to that effect. Whether I should have concurred in those decisions, it is now unnecessary for me to say; but being solemn decisions, I feel bound by their authority. It being then taken as established law, that the indictment would have been bad before the act 14 & 15 Vict. c. 100, I am therefore to consider whether the law, applicable to this question, has been altered by the act. The first section does not apply; it extends only to variances. The eighth section is the one which it may be argued most plausibly, dispenses with the necessity of stating to whom the property belonged; but I think, that we can only fairly conclude from that section, that it should no longer be necessary to specify the *individual who was defrauded*, and that the defendant, did the act with *intent to defraud any particular person*. That section does not, therefore, dispense with the necessity of stating the property to be in some one. The twenty-fifth section has been relied upon as curing the objection, on which error has been assigned. If this be a formal defect, then undoubtedly it is within that section. The defects there referred to must be taken on motion to quash the indictment, or on demurrer before the jury are sworn and not afterwards, and cannot be taken on writ of error. But how can you say that this is a

formal defect which must be proved as laid ? Where it is stated in an indictment that certain goods are the property of *J. S.* and it is proved that they belong to *J. A.* the variance could be amended, and if it turned out on the trial that the Bills of Exchange obtained by the false pretence here, were the property of *X. Y.*, under the first section, the defect could be amended by the Court. But that section does not apply to allegations necessary to be stated ; and that being so, and it having been decided before the act, that it was essentially necessary to state in the indictment *to whom* the property obtained by false pretences belonged, we are bound to give judgment for the defendant. The new act does not alter the law in this case.

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COLERIDGE J.—The real question here is, whether it is any longer necessary, in an indictment for obtaining money by false pretences, to state the ownership of the property of which the party has been defrauded, in consequence of the eighth section of 14 & 15 Vict. c. 100. If this statement must be made, an omission to make it is not a mere formal defect. The first section (*a*) is addressed to variances in the description of

(*a*) 14 & 15 Vict. c. 100, s. 1. From and after the coming of this act into operation, whenever on the trial of any indictment for any felony or misdemeanor there shall appear to be any variance between the statement in such indictment and the evidence offered in proof thereof, in the name of any county, riding, division, city, borough, town corporate, parish, township, or place mentioned or described in any such indictment, or in the name or description of any person or persons, or body politic or corporate, therein stated or alleged to

be the owner or owners of any property, real or personal, which shall form the subject of any offence charged therein, or in the name or description of any person or persons, body politic or corporate, therein stated or alleged to be injured or damaged or intended to be injured or damaged by the commission of such offence, or in the Christian name or surname, or both Christian name and surname, or other description whatsoever, of any person or persons whomsoever therein named or described, or in the name or description of any

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ownership of property, and amendments under that section are not to be made as matter of course, but only when not material to the merits of the case. If it were unnecessary to state the ownership of the property, such a statement might have been omitted ; but looking at sections one and eight, it appears to me that the ownership is necessary to be stated, for if proved to be incorrectly stated, it may be *amended* ; and if it is necessary to state the ownership of property, how can we say that this is a mere formal defect ?

WIGHTMAN J.—This Court is bound by the decisions, but I have in the course of the argument, entertained doubts whether since the eighth section of the act 14 & 15 Vict. c. 100, it is necessary to state the ownership of the property. Undoubtedly, before the passing of that act, the indictment would have been bad. I confess I still entertain some doubts whether, since the passing of that act, this allegation is neces-

matter or thing whatsoever therein named or described, or in the ownership of any property named or described therein, it shall and may be lawful for the Court before which the trial shall be had, if it shall consider such variance not material to the merits of the case and that the defendant cannot be prejudiced thereby in his defence on such merits, to order such indictment to be amended (a) according to the proof, by some officer of the Court or other person, both in that part of the indictment where such variance occurs and in every other part of the indictment which it may become necessary to amend, on such terms as to postponing the trial to be had before the same or another jury, as such Court shall think reasonable ; and after any such amendment the trial shall proceed, whenever the

same shall be proceeded with, in the same manner in all respects, and with the same consequences, both with respect to the liability of witnesses to be indicted for perjury and otherwise, as if no such variance had occurred ; and in case such trial shall be had at *Nisi Prius* the order for the amendment shall be endorsed on the *postea*, and returned together with the record, and thereupon such papers, rolls, or other records of the Court from which such record issued as it may be necessary to amend shall be amended accordingly by the proper officer, and in all other cases the order for the amendment shall either be indorsed on the indictment or shall be engrossed on parchment, and filed, together with the indictment, among the records of the Court.

sary ; but after the decisions that have been referred to, I feel bound to concur in the opinion of the rest of the Court.

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CROMPTON J.—I think this indictment is not cured by the statute, and I own I feel no difficulty upon the point. Before the passing of that act it was necessary to state two allegations, one as to the ownership of the property, and the other as to the intent to defraud some particular person. According to the cases, it has always been necessary to state the property; and we must be bound by these authorities to consider the omission of the statement of ownership to be an essential defect. The eighth section, which seems intended to cure any defect in the statement of the intent to defraud, was not aimed at any allegation respecting the property; and it is impossible to say that this omission is a mere formal defect, since, by the first section, power is expressly given to the Court to amend variances as to the statement of the ownership of property, at the trial.

The judgment of the Court below was accordingly reversed.

REGINA v. CHARLES RILEY.

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At the General Quarter Sessions of the peace for the county of *Durham*, held at the city of *Durham* Where a man driving a flock of lambs from a field, drove, with the flock, a lamb belonging to another person, without knowing that he did so, and afterwards, when he discovered the fact, sold the lamb, denied having done so, and appropriated the proceeds to his own use: *Held*, that he was rightly convicted of larceny; for having, in the first instance, driven away the lamb the property of another, he committed a *trespass*, which as soon as he resolved to dispose of the animal (the trespass continuing all along), became a *felonious trespass*.

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before *Rowland Burdon Esquire*, chairman, on the 18th day of *October*, 1852, the prisoner was indicted for having on the 5th of *October*, 1852, stolen a lamb the property of *John Burnside*.

The prisoner pleaded not guilty.

On the trial it was proved that on *Friday*, the 1st day of *October*, 1852, *John Burnside*, the prosecutor, put ten white-faced lambs into a field in the occupation of *John Clarke*, situated near to the town of *Darlington*. On *Monday*, the 4th day of *October*, the prisoner went with a flock of twenty-nine black-faced lambs to *John Clarke*, and asked if he might put them into *Clarke's* field for a night's keep, and upon *Clarke's* agreeing to allow him to do so for one penny per head, the prisoner put his twenty-nine lambs into the same field with the prosecutor's lambs.

At half-past seven o'clock in the morning of *Tuesday*, the 5th day of *October*, the prosecutor went to *Clarke's* field, and in counting his lambs he missed one, and the prisoner's lambs were gone from the field also. Between eight and nine o'clock in the morning of the same day, the prisoner came to the farm of *John Calvert*, at *Middleton Saint George*, six miles east from *Darlington*, and asked him to buy twenty-nine lambs. *Calvert* agreed to do so and to give eight shillings a piece for them. *Calvert* then proceeded to count the lambs, and informed the prisoner that there were thirty instead of twenty-nine in the flock, and pointed out to him a white-faced lamb, upon which the prisoner said if you object to take thirty, I will draw one. *Calvert*, however, bought the whole of them, and paid the prisoner twelve pounds for them.

One of the lambs sold to *Calvert* was identified by the prosecutor as his property, and as the lamb missed

by him from *Clarke's* field. It was a half bred white-faced lamb, marked with the letter *T*, and similar to the other nine of the prosecutor's lambs.

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The twenty-nine lambs belonging to the prisoner were black-faced lambs. On the 5th of *October*, in the afternoon, the prisoner stated to two of the witnesses that he never had put his lambs into *Clarke's* field, and had sold them on the previous afternoon for eleven pounds twelve shillings, to a person on the *Barnardcastle Road*, which road leads west from *Darlington*.

There was evidence in the case to shew that the prisoner must have taken the lambs from *Clarke's* field early in the morning, which was thick and rainy.

It was argued by the counsel for the prisoner, in his address to the jury, that the facts shewed that the original taking from *Clarke's* field was by mistake, and if the jury were of that opinion, then as the original taking was not done *animo furandi* the subsequent appropriation would not make it a larceny, and the prisoner must be acquitted. The Chairman, in summing up told the jury that though they might be of opinion that the prisoner did not know that the lamb was in his flock until it was pointed out to him by *Calvert*, he should rule that in point of law the taking occurred when it was so pointed to the prisoner and sold by him to *Calvert*, and not at the time of leaving the field.

The jury returned the following verdict:—"The jury say that at the time of leaving the field the prisoner did not know that the lamb was in his flock, and that he was guilty of felony at the time it was pointed out to him."

The prisoner was then sentenced to six months' hard labour in the house of correction at *Durham*, and

1853. being unable to find bail was thereupon committed to prison until the opinion of this Court could be taken upon the question :—

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Whether *Charles Riley* was properly convicted of larceny.

On the 25th November, A.D. 1852, this case was considered by JERVIS C. J., COLERIDGE J., PLATT B., WILLIAMS J., and MARTIN B.

No counsel appeared on either side, but it having been intimated to the Court that counsel were instructed in the case, but probably had not received notice of the sitting of the Court, JERVIS C. J. said that the Judges had, out of consideration to the prisoner, met to hear the case ; but as it was stated that counsel was instructed to appear on his behalf they would postpone giving judgment. They were then of opinion that the conviction was right, but they would afford him an opportunity of being heard upon the question raised in the case.

On the 22nd January, A. D. 1853, the case was argued before POLLOCK C. B., PARKE B., WILLIAMS J., TALFOURD J., and CROMPTON J.

Grey for the Crown.

A. Liddell for the prisoner.

Liddell. The conviction is wrong on three grounds. First, the original taking being when the lamb left the field, the question for the jury was whether the lamb was taken by the prisoner *animo furandi*, or by mistake ; the verdict of the jury amounts to a finding that it was taken by mistake. Secondly, the chairman misdirected the jury. He told them, that though they might be of opinion that the prisoner did not know that the lamb was in his flock until it was pointed out to him, that in point of

law the taking occurred when it was so pointed out to the prisoner, and sold by him, and not at the time of leaving the field. But in order to constitute larceny he should have told the jury that something more was necessary ; and the jury not having found it the Court will not now intend it. Thirdly, the finding of the jury does not amount to a verdict of guilty.

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POLLOCK C. B.—Suppose a traveller at an inn in packing up six pieces of anything packed up a seventh with it by mistake in his portmanteau. He does not find out the mistake till he goes to a distance, and then converts it to his own use. When does he take it ? Surely when he discovers his mistake and resolves to appropriate it to himself *animo furandi*.

Liddell. Here the prisoner had the lamb in his possession before the time of the alleged taking.

POLLOCK, C. B.—What do you mean by the term "possession ? "

Liddell. He had such a possession as would have enabled him to maintain trespass. If it be said that the prisoner took the lamb when it was pointed out to him on the road, then the jury have not found that he knew, or had the means of knowing, at the time, who the true owner was. The lamb was, in fact, *animal vagrans*, without an owner, and within the rule laid down by PARKE B., in *Reg. v. Thurborn*, 1 Den. C. C. 388. It was without an owner ;—it had no mark upon it to indicate the owner's name ; for it was marked *T.*, while the initial of the prosecutor's name was *B.* It was an estray, to take which at common law was no larceny. The law in cases of taking by mistake is stated in 1 Hale P. C. 505. If the sheep of *A.* stray from his flock to the flock of *B.*, and *B.* drive them along with his own flock, and by mistake and without knowing it or taking heed of the difference, shear them, it is no felony. But if *B.* knew

1853. them to be the sheep of another person, and tried to conceal the fact; if, for instance, finding another's mark upon them, he deface it, and put his own mark upon them, this would be evidence of a felony. When then was the felony committed here? Was it when the lamb left the possession of the true owner? It is submitted that the question here is, what was the prisoner's intent when the lamb left the field. His subsequent conduct is only evidence of that intent. The question was left in this way to the jury in the case, very similar to the present, by CRESSWELL J., *Reg. v. Cook*, 2 Russ. on Crimes, 12. That learned Judge told the jury "that if a person find an animal straying on the road, and take it with intent to dispose of it to his own use, it is larceny, and that the question for their consideration was, whether the prisoner so took the ewe and lamb, or whether they got mixed with the sheep he was driving, and he took them away by mistake." That case seems on all fours with this. The question here ought to have been left to the jury whether the lamb got mixed with the prisoner's flock by mistake, or whether he had a felonious intent when it first came into his possession. It cannot be said that there was no *asportavit*.

POLLOCK C. B.—Who was the *asportavit* by? The lamb walked away of its own accord.

Liddell. It is quite evident that before the sale of the lamb the prisoner might have maintained an action of trespass, upon his possessory title, although the property was in the true owner. If the lamb had strayed and mixed with the lambs of the prisoner, he would be in the innocent possession of it while he drove it six miles along the road, and then the rule laid down in *Thristle's case*, 1 Den. C. C. 501, would apply "that where a chattel comes into the possession of a party without the *animus furandi*, in the

first instance, the subsequent appropriation is no larceny."

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WILLIAMS J.—Suppose no *animus furandi*, and that a civil action is brought for the trespass. The whole would form a continuous transaction. In the first instance take it that here there is no *animus furandi* when the lamb is taken from the field; but the trespass continues, and then there is the *animus furandi*; does it not then become felony?

POLLOCK C. B.—The difficulty in the case is, *when* can it be said that there was a taking?

Liddell. If not when the flock left the field, when was the taking? The Chairman by his direction to the jury created a new state of facts inconsistent with the facts before the jury:—A man meets a lamb on the road, astray, and sells it, it being without an owner; which facts do not in law amount to larceny.

POLLOCK C. B.—The case is wholly silent as to whether the prisoner knew that he had thirty instead of twenty-nine lambs till he came to sell them.

PARKE B.—The prisoner must have driven them away. In doing so he committed a trespass; which began when he left the field. The trespass continued all along, like a trespass begun in one county and continued in another. The technical words of the indictment for stealing cattle are *cepit, effugavit abduxit*. When the thirty lambs left the field the prisoner must have driven them away; then he became a trespasser, though not a felonious trespasser; but when he afterwards sold the lamb the trespass became a felony.

Liddell. Is not this like the case where the prisoner had possession of a chattel dispossessably.

PARKE B.—No. That was not a case of trespass. That was a case where trover might have been maintained; where the chattel was found, and the person who found it had a good title against all the world.

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Liddell. In *Preston's case*, 2 Den. C. C. 353, where a bank note was lost and found by the prisoner, it was held that the jury are not to be directed to consider at what time the prisoner, after taking it into his possession, resolved to appropriate it to his own use, but whether at the time he took possession of it, he knew or had the means of knowing who the owner was, and took possession of it with intent to steal it; for if his original possession of it was an innocent one, no subsequent change of his mind or resolution to appropriate it to his own use, would amount to larceny. In that case one of the Judges asked whether, if a man took an umbrella by mistake, and three or four days afterwards discovered who the owner was, by the name upon it, and then resolved to keep it, would that be larceny?

PARKE B.—The taking being a trespass; when there is the *animus furandi* it becomes a felony.

POLLOCK C. B.—There is a great difference between the case of finding an article, and taking an article out of the possession of the true owner. In the case of taking an umbrella by mistake, if there be an *animus furandi*, the taking becomes a felony.

Liddell. It was said in *Preston's case* by TALFOURD J., that a mere movement of the mind could not make that larceny, which was not so before. Can it, therefore, be said here, that when the prisoner resolved to sell the lamb he became guilty of felony?

POLLOCK C. B.—But when he sold it the act of selling was more than a mere movement of the mind. It was a felony.

Liddell cited *Leigh's case*, 2 East P. C. 694.

Grey, for the Crown, was not called upon.

POLLOCK C. B.—We are all of opinion that the conviction in this case is right. The distinction between this and the case of *Reg v. Thistle*, 1 Den.

C. C. 502, is this. If a man rightfully gets possession of an article without any intention at the time of stealing it, and afterwards misappropriates it, the law holds it not to be a felony. In that case a man had delivered his watch to a watchmaker to regulate it, and the watchmaker afterwards disposed of it for his own use. In the case of *Reg. v. Thurburn*, 1 Den. C. C. 388, where PARKE B. delivered the considered judgment of the Judges, it was ruled that "if a man find goods that have been actually lost, or are reasonably supposed by him to have been lost, and appropriates them with intent to take the entire dominion over them, really believing, when he takes them, that the owner cannot be found, it is no larceny; but if he takes them with the like intent, though lost or reasonably supposed to be lost, but reasonably believing that the owner can be found, it is larceny." It may reasonably be said not to be a violation of any social duty for a man who finds a lost article to take it home for the purpose of finding out the true owner; and if he does this honestly in the first instance, and afterwards, though he may have discovered the true owner, is seduced into appropriating it to his own use, he is not guilty of larceny, though he does wrong. So in *Leigh's case*, 2 East P. C. 694, it appeared that the prosecutor's house was on fire, and that the prisoner assisted in saving some of his goods, and took some of them home to her lodgings, but next morning denied that she had them in her possession. It was suggested that she originally took the goods with an honest intent, that of assisting in saving her neighbour's property from the fire. She was found guilty; but the Judges, as it appeared that she originally took the goods merely from a desire of saving them for and returning them to the prosecutor, and that she had no evil intention till afterwards, held that the con-

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viction was wrong. There the original taking was not wrongful; indeed it was right, for she took possession of the goods under the authority of the true owner. In all these cases the original possession was not wrongful. But in the case now before the Court, the prisoner's possession of the lamb was from the beginning wrongful. Here the taking of the lamb from the field was a trespass; or if it be said that there was no taking at that time, then the moment he finds the lamb he appropriates it to his own use. The distinction between the cases is this: if the original possession be *rightful*, subsequent misappropriation does not make it a felony; but if the original possession be *wrongful*, though not felonious, and then a man disposes of the chattel, *animo furandi*, it is larceny.

PARKE B.—The original taking was not lawful. The prisoner being originally a trespasser, he continued a trespasser all along, just as at common law, a trespass begun in one county continued in another, and, being a trespasser, the moment he took the lamb with a felonious intent, he became a thief. He at first simply commits a trespass; but as soon as he entertains a felonious intent that becomes a *felonious trespass*. *Leigh's case* was altogether a different case from the present. There the original possession was lawful, with the assent of the true owner, the prisoner rendering charitable assistance in preserving the goods from fire. When she first took the goods into her possession, she was not a trespasser.

WILLIAMS J., TALFOURD J., and CROMPTON J., concurred.

Held at the 2nd

KENT LENT ASSIZES, 1853.

REGINA v. WILLIAM MANKLETOW.

1853.

THE prisoner was tried and convicted before me at the last *Maidstone Assizes*, upon an indictment framed on the 20th section of the 9 *Geo. 4*, c. 31, which makes it a misdemeanor, "if any person shall unlawfully take or cause to be taken any unmarried girl, being under the age of sixteen years, out of the possession and against the will of her father or mother, or of any other person having the lawful care or charge of her."

The prisoner had for some time lodged in the house of *John Frost*, a labouring man at *Rottendeane*, and stated to him and the family his intention to emigrate to *America*. On the 7th *February* he took leave of them, and went with *John Frost* to *Maidstone*, by the *Sutton Road*, there to take the train for *London*. It was understood between them that *John Frost*, after parting with him would return by the *Staplehurst Road*.

A short time before his departure he had privately persuaded *Anne Frost*, *John's* daughter, a girl between twelve and thirteen to go with him to *America*, and on the morning of his departure, he had secretly told her to put up her things in a bundle, and walk to a point named on the *Sutton Road*, where he would meet her. She did so: and the prisoner having parted

A girl under the age of 16 having, by persuasion, been induced by the prisoner to leave her father's house and go away with him without the consent of the father, left her home alone by a pre-concerted arrangement between them, and went to a place appointed, where she was met by the prisoner, and then they went away together some distance, without the intention of returning: Held.

1st. That there was a taking of the girl out of the father's

possession, within the meaning of the stat. 9 *Geo. 4*, c. 31, s. 20, by the prisoner, when he met the girl and went away with her at the appointed place, as up to that moment she had not absolutely renounced her father's protection.

2ndly. Such taking need not be by force, actual or constructive, and it is immaterial, whether the girl consents or not.

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with the father on the *Staplehurst Road*, returning home went to the *Sutton Road*, and met her at the place appointed. He placed her clothes amongst his own in one of his boxes, and the two travelled in a covered van all night to *London*. Information was sent to *London*, and in the morning he was taken into custody at the instance of the girl's uncle. He stated at the time of his apprehension, that he had paid the girl's passage to *London*, and was going to take her to *America*.

The prisoner's counsel relied on the case of *R. v. Meadows*, 1 C. & K. 399, and urged that as the girl went voluntarily, there was no taking within the meaning of the 20th section. The case of *R. v. Robins*, ibid. 458, was cited on the other side, and it was stated that my Brother *Maule*, at the same place on the previous circuit, had declined to act on *R. v. Meadows*.

I overruled the objection, and told the jury that the girl was in her father's possession while in his house, although he was not actually in it ; that the taking need not be by force, nor against the girl's will : and that if the prisoner by persuasion induced her to leave her father's roof against his will, in order to her going with him to *America*, the case was within the statute. On this direction the jury found him guilty, and I sentenced him to nine calendar months' imprisonment.

I reserved the point, and now desire the opinion of the Judges on the propriety of the conviction.

J. T. COLERIDGE,

April 15, 1853.

On the 23rd *April*, 1853, this case came on for argument, *coram JERVIS C. J., PARKE B., COLERIDGE J., MARTIN B., WIGHTMAN J., and CRESSWELL J.*

Ribton for the prisoner. The question for the con-

sideration of the Court is, what is the meaning of the word "take" in the 9 Geo. 4, c. 31, s. 20. The words of that section are as follow:—"That if any person shall unlawfully take or cause to be taken any unmarried girl, being under the age of sixteen years, out of the possession and against the will of her father or mother, or of any other person having the lawful care or charge of her," &c. It is submitted that a taking within this section must be a forcible one, and not one which is the result of mere persuasion. By a careful reading of this section, together with the words of the 21st section, it is obvious that it was the intention of the Legislature to limit the operation of the 20th section to a forcible taking; for, if it had not been so limited, it would not have been necessary for the Legislature to have used the additional words which we find in the 21st section. The words of that section are, that if any person "shall maliciously, either by force or fraud, lead or take away, or decoy, or entice away, or detain any child," &c. Now, if the word "take" is not limited to a forcible taking, actual or constructive, why are the words "lead or take away, decoy or entice," used? The case of *Reg. v. Meadows*, 1 C. & Kir. 399, seems to be a case in point. There (a), a girl under sixteen, who was in

(a) Mr. Baron PARKE having kindly furnished the Editor with a copy of his Notes in *Reg. v. Meadows*, it has been thought well to append them in a note.

Stafford Lent Assizes, 1844.
Monday, March 11th.

Cor. PARKE B.

Regina v. Mary Meadows.

Indictment. That prisoner on 6th February last, at *Wolverhampton*, unlawfully did take and cause to be taken one *Caroline Allen* out

of the possession and against the will of *Richard Westwood* her father-in-law, the said *Caroline Allen* being an unmarried girl under the age of sixteen years (to wit) of the age of thirteen years, against the statute, &c.

2nd Count charges the taking of said *Caroline Allen* out of the possession, &c., of *Richard Westwood*, he then and there having the lawful care and charge of her.

3rd Count for taking said *Caroline* from *Ann Westwood* her mother.

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service, on returning from an errand was asked by *B.* if she would go to *London*, as *B.*'s mother wanted a servant, and would give her five pounds wages. *A.* and *B.* went away together to *Bilston*, where both were found, and *B.* was apprehended. *Held*, that this was not such a taking or causing to be taken of *A.* as was sufficient to constitute the offence of abduction under the 20th section of the 9 *Geo. 4.* c. 31.

PARKE *B.*--I may state, I have looked over my notes in the case of *Reg. v. Meadows*, and the facts do not seem quite to bear out the marginal note just read. The facts there were somewhat different to the present case. I do not say the Report is incorrect. I may have used the expression attributed to me. All I mean to say is, that the facts were different.

Ribton. It is submitted that the words “*take away*” have a definite legal signification; and include

4th Count for taking her from *Sarah Ann Tombs*, she having the lawful care and charge of her.

5th Count for taking her from *Ann Westwood* her mother and *Richard Westwood* her father-in-law.

6th Count for taking her from *Ann Westwood* and *Richard Westwood*, who had the lawful care and charge of her.

7th Count for taking her from *Ann Westwood*, *Richard Westwood*, and *Sarah Ann Tombs*, they having the lawful care and charge of her.

Caroline Allen. 13 and upwards. My mother is *Ann Westwood*. On 13th February, 1844, I was in service of Mrs. *Tombs* at *Druid's Head*, North Street, *Wolverhampton*; my mistress sent me to the *Wabb* (?) for two loaves and a shilling. I came back by *Horseley* fields; I saw prisoner there, standing at the door of *Lucas'*, where she was lodging: I had known

her before: we went to school together: I knew she had been in *London*: she asked me whether I would go to *London* with her,—her mother wanted a little girl, and she would give me £5 wages; the children in the house were with her; there was a little boy; she said I, and the boy, and herself, were to go under the name of *Davis*, and pass for brother and sister. She took a piece off the loaf. I went with her to *Belston*, because she cut the loaf, and I dare not go home: we stopped at *Belston* that night. All three of us went from *Lucas'*. She knew I lived at *Druid's Head* in service. She washed herself, and put on her bonnet and shawl.

She did not go to Mrs. *Tombs* nor my mother,

COLERIDGE J. and I agree, the prosecution cannot be supported.

Not Guilty.

a force either actual or constructive. The rule as to the construction of statutes is well laid down in *Dwarris on Statutes*, p. 669. The word "take" is not comprehensive enough in itself to include the words "decoy or entice," otherwise the Legislature would not have added those words in the 21st section.

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CRESSWELL J.—Do you contend that the word "take" always means a taking against the will of the person taken?

ALDERSON B.—Suppose you take a person to the Playhouse, does it follow that it is against the will of the person taken?

Ribton. But the words of the 20th section are, "unlawfully take out of the possession and against the will." Here the girl was a voluntary agent, and in *Reg. v. Meadows*, PARKE B. says, "There must be a taking, and from the evidence it appears that the child accompanied the prisoner voluntarily."

ALDERSON B.—In that case you might with equal reason have indicted the other girl for taking away the prisoner.

COLERIDGE J.—If you look to the 19th section you will find the Legislature uses the words "take away or detain such woman against her will." Why are the words "against her will" introduced, if, as you say, the word "take" necessarily implies against the will?

JERVIS C. J.—It would appear from reading the 19th, 20th, and 21st sections of this act, that where the person is a woman over a certain age, or where she is a girl under the age of sixteen years, the taking must be out of the possession and against the will of the father or mother, or other person having lawful care or charge of her; and where it is a child under

1853. the age of ten years, the words are, "to lead or take away, or decoy or entice away."

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PARKE B.—The 19th section relates entirely to the party abducted. The 20th and 21st to those having the charge or care of her.

Ribton. The 10 *Geo. 4*, c. 34, s. 23, referring to *Ireland*, might be cited. There the word "forcibly" was used, and the word "allure." In *Reg. v. Robins*, 1 C. & Kir. 456, the prisoner was present all the time. There *A.* went to the house of *B.* and placed a ladder against a window, and held it for *J.* the daughter of *B.* to descend, which she did, and then eloped with *A.* *J.* was a girl under sixteen, namely, fifteen years old. It was held that this was a taking *J.* out of her father's possession within the 9 *Geo. 4*, c. 31, s. 20, although *J.* had herself proposed to *A.* to bring the ladder and to elope with him. In the case of *Reg. v. Biswell*, 2 Cox C. C. 279, and *Reg. v. Kipps*, 4 Cox C. C. 167, the point was not fully argued.

JERVIS C. J.—I find by referring to *Reg. v. Kipps*, in Cox C. C., there is a note which gives a correct explanation of what my Brother PARKE meant in *Reg. v. Meadows*. It will be seen that the words "out of the possession of the father" are important. The girl by voluntarily going from the father's house may have severed the possession of the father, and so could not be said to be taken out of the possession of her father. I do not find in *Reg. v. Kipps*, that that point was brought before my Brother MAULE's mind.

PARKE B.—Supposing the girl to have abandoned her father's possession, and the prisoner then to take her away, it would not come within the statute. But supposing she conditionally abandoned the possession of her father under the impression that the prisoner

would be at a certain point to take her away, that would not be a determination of the father's possession.

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Ribton. The case of *Reg. v. Hopkins*, 1 C. & M. 254, is in my favour. There it was held, that where a man by false and fraudulent representations induced the parents of a girl between ten and eleven years of age to allow him to take her away, such taking away of the girl was held to be an abduction within the meaning of the statute 9 Geo. 4, c. 31, because there could not be said to be any consent by reason of the fraudulent representation.

No Counsel appeared for the Crown.

JERVIS C. J.—I am of opinion this conviction is right. Two points have been raised in the course of the argument; first, as to the meaning of the word “*take*,” in the act of Parliament. The counsel for the prisoner contends that the taking must be force, actual or constructive. Upon a reference to the sections of the act of Parliament, I do not think this is so. In the case of where a girl is of a certain age the taking must be against her will; but in a case like the present it is unimportant whether or not she consents. The act was passed to protect parents and others having the lawful charge or custody, and it is therefore immaterial whether the taking be with or without the consent of the girl. The second question is, was there a taking of the girl out of the possession of the father? A manual possession is not necessary. If the girl were a member of the family, and under the father's control, there is a sufficient possession. If a girl leaves her father's house for a particular purpose, with his sanction, she cannot legally be said to be out of her father's possession. Here the father had possession until the very act of taking. I do not think

1853. the case of *Reg. v. Kipps* interferes at all with the decision in *The Queen v. Meadows*.

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PARKE B., ALDERSON B., WIGHTMAN J., and CRESSWELL J. concurred.

Conviction affirmed.

X9 Cno 263

1853. REGINA v. THOMAS AND HENRY MILLARD.

c. 3. Corr & Co. 150

THE defendants were severally indicted for perjury, in the evidence they gave before two magistrates upon the trial of an information under the Malicious Trespass Act, 7 & 8 Geo. 4, c. 30, s. 24

Mr. Robertson, a gentleman of the county of Pembroke, laid an information (but not on oath) before a justice of the peace against a person of the name of Wiggin, for wilful damage to the carriage of the complainant. A summons was issued against Wiggin to appear to answer the charge, and he appeared accordingly; the defendants, Thomas Millard and Henry Millard, were examined as witnesses against Wiggin, and the indictment was for perjury upon that examination.

It was objected for the defendants that to give the magistrates jurisdiction the information must, by the 30th section of the act, be *on oath*, which it was not in mine the case *ex parte*, or issue his warrant to apprehend the party, or, without summons, may issue his warrant, and the justice before whom the party charged shall appear or be brought, shall hear and determine the case.

Held, that sect. 30 did not control the effect of sect. 24, and that it was not necessary that there should be an information on oath to give the magistrate jurisdiction to hear the case, when the party charged appeared before him.

the present case. I thought that the magistrate had jurisdiction, and that the omission to lay the information *on oath* was an error in procedure only; but as the case is one of very general application, I reserved the point for the opinion of the Court of Appeal.

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MILLARDS' Case.

WM. WIGHTMAN.

The prisoners were convicted, and were sentenced to imprisonment on that indictment.

W. W.

This case was argued on the 23rd *April*, 1853, before JERVIS C. J., PARKE B., ALDERSON B., WIGHTMAN J., and CRESSWELL J.

Terry, for the prisoners. In an indictment for perjury, it is necessary to allege that the perjury was committed in the course of a judicial proceeding. (*3 Inst.* 166). In the present case the evidence shews that there was no judicial proceeding, inasmuch as the information on which the magistrate proceeded was not on oath.

PARKE B.—The rule of law is, that unless a statute requires it, an information need not be on oath, or even in writing. *Baston v. Carew*, 3 B. & C. 649; *Wilson v. Weller*, 1 B. & P. 57. It is true a magistrate cannot proceed without an information. The question turns upon the 30th section of the act. Does that section make it a condition in all cases of summary conviction under the act that the information shall be upon oath?

Terry. It is submitted that it does.

JERVIS C. J.—My learned Brothers and myself are all of opinion that the conviction is right. Section 24 of the act gives jurisdiction to a magistrate to convict in all cases of wilful damage to property not specially provided for in the act. Does section 30 require that the information should be on oath? Had that section

1853. been omitted from the act, it is clear that the information need not have been upon oath. As my Brother PARKE observes, "An information need not even be in writing," unless directed by the statute. I am of opinion that section 30 is not engrafted on section 24. If a party charged appear before a magistrate, his jurisdiction is founded to hear and determine the case; but if he does not appear, the proceedings must be under the 30th section, and there must be an information on oath in order to justify an *ex parte* proceeding. Section 30 only gives, in my opinion, a cumulative remedy, and that view is fortified by a consideration of the language of section 29, which commences with these words: "That the prosecution for every offence punishable on summary conviction under this act, shall be commenced within three calendar months after the commission of the offence," while section 30 begins with the words, "And for the more effectual prosecution of all offences," &c. My Brother WIGHTMAN was right in saying that the information on oath was a matter of procedure only.

All the other learned Judges concurred.

Conviction affirmed.

2d Engd Aug 562

Part 257

REGINA v. ABRAHAM REED.

*A. was sent
by his master
to the rail-
way station
for 10 cwt.*

At the General Quarter Sessions of the peace for the county of Kent, holden at Maidstone, on the 4th

of coals, which being supplied were placed in sacks and put into the master's cart.

The prisoner was directed by his master to bring the coals to his house. On his way

home, without authority, he disposed of a quantity of the coals to a third person.

Query. If the offence amounted to larceny or embezzlement?

day of *January*, 1853, before *Aretas Akers, Edward Burton, and James Espinasse*, justices appointed in and for the county of *Kent*, *Abraham Reed* was tried upon an indictment for feloniously stealing two cwt. of coals, the property of *William Newton*, his master, on the 6th day of *December*, 1852, and one *James Peerless*, was charged in the same indictment with receiving the coals, knowing them to have been stolen, but was acquitted. The evidence of the prosecutor, *William Newton*, was as follows: "I am a grocer and miller at *Cowden*, and sell coals by retail. The prisoner *Reed* entered my service last year, about three weeks before the 6th of *December*. On that day I gave him directions to go to a customer to take some flour, and thence to the station at *Edenbridge*, for 10 cwt. of coals. I deal with the *Medway Company*, who have a wharf there, *Holman* being wharfinger. I told *Reed* to bring the coals to my house. *Peerless* lives about 500 yards out of the road from the station to my house. *Reed* went about 9 A.M., and ought to have come back between 3 and 4 P.M.; but as he had not come back, I went in search of him at half-past six and found him at *Peerless's*. The cart was standing in the road opposite to the house, and the two prisoners were taking coals from the cart in a truck basket. It was dark. I asked *Reed* what business he had there. He said to deliver half a hundred weight, for which he had received an order from *Peerless*. *Reed* had never before told me of such an order, and had no authority from me to sell coals. Later that evening I went and asked *Peerless* what coals he had received from my cart. He said half a hundred weight. I then asked him how they were carried from the cart. He said in a sack. I weighed the coals when brought home, and found the quantity so brought at half a hundred weight and four pounds short. I went to *Peerless's*

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next day and found some coals there, apparently from half to three quarters." Upon his cross-examination he stated as follows. I believe *Peerless* had sometimes had coals from me. When I came up they were shutting the tail of the cart, but some coals were in a truck basket at their feet. *Reed* said at once he had received an order from *Peerless*. It was two hours later when I asked *Peerless*, and when he said he had ordered them. *Reed* said he had carried two cwt. in, but that was two hours after.

On his re-examination he said, I think *Peerless* had had some coals from me about a fortnight before the sixth.

James Holman, another witness for the prosecution said, I am a wharfinger to the *Medway Company* at *Edenbridge* station, and *Newton* deals there for coals. *Reed* came on the 6th of *December*, and asked for half a ton for *Newton*, and I supplied him. I entered them at the time to *Newton*, and now produce the book with the entry.

James Handley, another witness for the prosecution. I am superintendent of the *Sevenoaks* division. On the 17th *December* I went to *Peerless*, and asked him how much coals he had received from *Reed*. He said he had ordered half a hundred weight three weeks before. *Reed*, when I asked him afterwards, said three days before. *Reed* said he had received two glasses of wine from *Peerless*.

On his cross-examination, he said this was about 4 p. m., 7th *December*.

Newton was then re-examined, and said; *Reed* came to me in the morning of the 7th. I told him two hundred weight and three quarters were missing. He then said one sack had been left at the wharf by mistake, I therefore charged him with only three quarters.

Holman, upon re-examination, said *Reed* left a sack behind him, but it was an empty one.

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This being the case for the prosecution, the Counsel for the prisoner submitted that there was no case to go to the jury on the charge of larceny, inasmuch as the possession of the coals left at *Peerless*'s had never been in *Newton*, the master.

The Counsel for the prosecution contended that the coals were constructively in the possession of *Newton*, and that the offence was properly charged as larceny, but that under the provisions of the act of the 14 & 15 Vict. c. 100, s. 13, it was immaterial whether the offence were larceny or embezzlement, as the jury might find a verdict either for larceny or embezzlement.

The Counsel for the prisoner thereupon proposed that it should be left to the jury as a charge of embezzlement, but this was objected to.

The Court were of opinion that there was a constructive possession in the master, and left the case to the jury as one of larceny. The jury found the prisoner guilty. The Counsel for the prisoner then applied to the Court to submit the case for the opinion of the Judges. The Court respite the judgment and discharged the prisoner upon entering into recognizances, and the Chairman reserved the point as to whether or not the prisoner was rightfully convicted of larceny upon the evidence.

This case was argued on the 23rd of April, 1833, before JERVIS C. J., PARKE B., ALDERSON B., WIGHTMAN J., and CRESSWELL J.

Rose for the Crown

Ribton for the prisoner.

Rose having been called upon by the Court. This is a case of larceny, and it is submitted that the

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prisoner was properly convicted of that offence at the trial. The question was one of constructive possession. It appeared from the evidence that the prisoner was in the service of one *William Newton*, and that on the 6th of *December* he was sent by his master to the station with a cart for ten cwt. of coals. He asked for the coals in the name of his master, and they were supplied to him by the wharfinger, who entered them in the name of *Newton*. The prisoner was desired by the master to bring the coals to his house. At the station the coals were placed in the master's cart, and from that time it is contended that the property was constructively in the possession of the master through his servant, and that any appropriation afterwards by the latter would make him guilty of larceny. The case of *Rex v. Nicholas Abrahahat*, 2 Leach C. C. 824, seems to be a case in point. There it is said, if a cornfactor purchase the cargo of a vessel laden with corn, and sends his servant with a lighter to fetch it from the ship in loose bulk, and the servant contrives to have a certain portion of it put into sacks by the meters on board the ship, and takes the corn so sacked feloniously away in the lighter immediately from the ship, he may be indicted for stealing the property of the cornfactor, although it was never put into his lighter, or otherwise reduced into the cornfactor's possession. In that case the prisoner had never been employed by the prosecutors, nor was he authorized to do so. In the present case the prisoner had no authority to sell the coals (*a*). It is submitted that this case is even

(*a*) In the case cited by counsel there is the following note. "In this case," says Mr. *East*, "there appears to have been a tort committed by the servant in the very act of taking, and the property of his master in this case was com-

plete before the delivery to him. And after the purchase of it in the vessel they had a lawful and exclusive possession of it against all the world but the owner of such vessel."

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stronger, for here the coals are placed in the master's cart which was sent by him for that purpose. The case of *Rex v. John Spears*, 2 Leach C. C., is also a strong authority for the present position. In that case the prosecutors were cornfactors. The prisoner was employed in their service as lighterman, and was ordered to go with their barge to one *Wilson*, a corn meter, for as much oats in loose bulk as the barge would carry. The prisoner proceeded with the barge alongside a ship lying in the river *Thames*, and received from *Wilson* 220 quarters of oats in loose bulk, and five quarters in sacks. The cargo having been purchased by the prosecutors. On the prisoner's arrival with the barge at the ship, he desired the corn meter to put five quarters of the oats into ten sacks. When so filled the sacks were placed in the cabin of the barge. The 220 quarters being loaded into the barge in loose bulk. The corn meter soon after going up the river saw the barge, lying two or three hundred yards from the place where the loading was taken in, and observed that the ten sacks containing five quarters of oats were not in or upon the barge. On the oats being measured on the arrival of the barge at the prosecutor's wharf, only 220 quarters were found in the barge, and were all in loose bulk, and no oats in sacks being on board the barge. The prisoner was found guilty, and upon a case reserved, the Judges were of opinion that the conviction was right. In the case of *Rex v. Walsh*, 4 Taunton Rep. 276, *Heath J.*, in reference to the case of *R. v. Spears*, says, "That case went upon the ground that the corn was in the prosecutor's barge, which was the same thing as if it had been in his granary," so here the coals were in the master's cart the same as if they were upon his premises.

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JERVIS C. J.—In this case, were the coals bought at the wharf by the prisoner?

Rose. They were ordered in the name of the master, and were sold to the master. The vendors had the power of selecting the coals, and they were by them appropriated to the vendee, even before they were taken away.

PARKE B.—The purchase was by the master?

Rose. Yes. And, upon the authority of the cases cited, it is submitted there was a constructive possession from the time of the delivery to his servant. And if there were such constructive possession in the master, the servant had only a bare custody or charge of the coals, and the legal possession remained in the master, and so, by an unlawful appropriation, the prisoner would be guilty of larceny. In the case of money which is in the possession of the master by the hands of one of his clerks, and another clerk takes it from such clerk, he is guilty of larceny, and not embezzlement. *Rex v. Murray*, R. & M. C. C. R. 276; 5 C. & P. 145.

JERVIS C. J.—Supposing a servant receives a certain sum of money for his master, say 20*l.*, is he bound to pay the exact identical coin? Would it not be sufficient if he paid 20*l.*?

Rose. Perhaps so.

JERVIS C. J.—Or take the case of money in bags, or goods in sacks, as in the present case.

Rose. In the present case the coals were in sacks, and then placed in the master's cart.

CRESSWELL J.—Does it make all the difference for your case that the coals were sent in the master's cart?

JERVIS C. J.—In the case put of the money, would trover lie?

PARKE B.—According to the old authorities, account only could be maintained. It is so laid down in *Holliday v. Hicks*, Cro. Eliz. 638. Trover and conversion of 25*l.* The defendant pleaded not guilty, and the jury found a special verdict, that the defendant being servant and factor to the plaintiff, sold twenty quarters of his master's corn for 25*l.* *Stevens* moved, for the defendant, that this verdict was found for him, for this 25*l.* was never in his master's possession nor his money, and this action lay not, but rather an account. This also is money out of the bag ; but *Fenner* held that it was found for the plaintiff, for the possession of the servant is the master's possession, and it is as if he had always had it in his possession. I find after, that error was brought of this judgment. It is so reported in *Cro. Eliz.* 746. “The property of the money was never in the master, but in the servant ; for if a man delivers money to another, the property thereof is in the bailee, because it cannot be known, and he can maintain account only *quod omnes alii praeter clerk et Walmsley concesserunt*, for the writ of account proves the property of the money to be in him, for it supposeth that he is *receptor denariorum* of the plaintiff ; but here the plaintiff's declaration is not good, for it is alleged that he *casualiter perdidit*, and when he had lost the possession thereof he hath lost the property also, because it cannot be known ; and here all the Justices and Barons agreed that it should be reversed.”

Rose. In all cases of larceny there is a trespass, and it is submitted that the prisoner committed a trespass when he removed the coals from the cart. Upon the authority, therefore, of the cases cited, it is contended that the conviction for larceny was right.

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**Ribton* for the prisoner. This conviction cannot be supported, as there was no sufficient possession of the master in the coals at the time of the alleged appropriation. There is a great difference between the right of possession and the possession itself, and the fallacy of the argument for the prosecution arises from a want of making a proper distinction in that respect. Nothing short of a possession, actual or constructive, will support larceny. It is admitted that in every larceny there is a trespass, but it is denied that there was any trespass by the servant in the present case. The case of *Rex v. Abrahart* and *Rex v. Spears*, cited by my learned friend, it must be confessed would appear to support the supposition, that when the coals were delivered to the servant and placed in the master's cart, that they were constructively in the possession of the master. The more recent authorities go to support a contrary doctrine, and must be taken to overrule the older cases. It is broadly contended that there could be no possession of the coals by the master until they arrived at their final place of deposit, and that the fact of their being placed in the master's cart, was no more than if a chattel had been given into the hands of the servant. Whilst they are *in transitu* they are in the possession of the servant. In support of this view I would refer to *Watts' case*, 2 Den. C. C. p. 14. The prisoner was convicted upon the 14th count of the indictment, which charged him with stealing a piece of paper, the property of *Goldsmid* and others, his masters. *Goldsmid* and others were the directors of the *Globe Insurance Company*, and managed the affairs of the company, and had the general control over the clerks and servants, and also had the custody of the books and papers of the company. The com-

pany had a drawing account with *Glyn* and Co., and used to send their passbook on *Tuesday* in every week to be written up, and their messenger went the following morning, when it was returned together with the cheques of the preceding week. The prisoner was a salaried clerk and also a shareholder. It was his duty to receive the passbook, and to preserve the vouchers for the use of the company. On the 27th *February*, *Glyn* and Co. delivered the *Globe* passbook containing a certain cashed cheque for 1400*l.* to the messenger of the company, who delivered the book and cheque to the prisoner, and he thereupon fraudulently destroyed it. It was held that the prisoner was guilty of larceny, and that the cheque was constructively in the possession of the directors. WILDE C. J. in delivering the judgment of the Court, says, "The paper in question therefore, as soon as it had passed from the hands of the messenger and arrived at its ultimate destination, in custody of the prisoner for the directors, was really in their possession, and when he afterwards abstracted it for a fraudulent purpose, he was guilty of stealing it from them." The ground of the learned Chief Justice's decision was, that the cheque had arrived at its final place of destination, and was so in the possession of the directors. In the case of *Regina v. Joseph Hayward*, 1 C. & Kir. 518, the delivery of the straw was said to be complete when put down at the stable door. In that case *A.* had agreed to buy straw of *B.* and sent his servant *C.* to fetch it. *C.* did so, and put down the whole quantity at the door of the stable, which was in a court-yard of *A.*, and then went to *A.* and asked him to send some one with the key of the hay loft, which was over the stable. *A.* did so, and *C.* put part of the straw into the hay loft, and carried the rest away to

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the public house and sold it. It was held that the carrying away the straw by *C.*, if done with a felonious intent, was a larceny, and not an embezzlement, as the delivery of the straw to *A.* was complete when it was put down at the stable door.

JERVIS C. J.—Just read me the words of the 7 & 8 Geo. 4, c. 29, s. 47, relating to embezzlement. What are the particular words referring to property?

Ribton. They are “chattel, money, or valuable security;” and even in the case of a servant sent by his master to get change for a note, who embezzled the change, it was held he could not be indicted for larceny, but must be indicted under the 39 Geo. 3, c. 85. That statute was repealed, and in substance re-enacted by the 7 & 8 Geo. 4, c. 29. *Rex v. Sullens*, 1 R. & Moo. C. C. R. 129. And in the case of *Rex v. John Waite*, 1 Leach, C. C. 28, it was determined not to be felony by the common law for a cashier of the Bank to embezzle an *Indian* bond. And in 2 East, 571, the reason assigned for the opinion of the Court was, that the bonds were received by *Waite* and were never put in the cellar as usual, so that the possession was always in him until he had placed them in the cellar, which was the place of final deposit. And *Dennison* J. said, that though there might be a possession in the Bank whereon they might maintain a civil action, yet there was a great difference between such a possession and a possession whereon to found a criminal prosecution. In *Bazeley's case*, 2 East, 571, where a clerk in a banker's shop received money and notes paid in by a customer on his account, and the clerk placed the money in the till, but embezzled the notes immediately, it was held no larceny, but only a breach of trust at common law, for though the possession of the servant is for many purposes, and against third persons,

the possession of the master, yet here the master never had a possession distinct from the servant as against him, and his receipt being lawful there was no tortious taking, without which there can be no larceny. The case of *Reg. v. Masters*, 1 B. & Ald. 362, was cited in the course of the argument.

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Cur. adv. vult. See post 25

REGINA v. PHILLPOT.

1853.

At the General Quarter Sessions of the peace for the county of *Kent*, holden at *Maidstone*, on the 4th day of *January*, 1853.

Priscilla Phillpot was tried upon an indictment charging her as follows:—

That before and at the time of the committing of the offence next hereinafter mentioned, to wit, on the 20th day of *December*, A.D. 1852, *Priscilla Phillpot*, late of the parish of *Chatham*, in the county of *Kent*, was the mother of, and then had the care and custody of an infant female child, whose name is to the said jurors unknown, of tender years, to wit, of the age of seven years, and unable to support or maintain herself, or to provide herself with necessary and proper food and clothing, whereby it became and was the duty of the said *Priscilla Phillpot* to maintain and support the said infant child, and to provide the said infant child

If a woman wilfully abandons her infant child of too tender years to provide for itself, in order to render her indictable at common law it is necessary to aver and prove an injury to the health of the child; and it will not be sufficient to support an averment that the health of the child had been greatly and materially injured, to

shew "that the child had suffered injury, but not to any serious extent."

1853. with necessary and proper food and clothing. Nevertheless the said *Priscilla Phillpot* being an evil disposed person, and not regarding her said duty in that behalf, on the day and year aforesaid, at the parish aforesaid, in the county aforesaid, did unlawfully and wilfully neglect to support or maintain the said infant child, or to provide the said infant child with necessary and proper food and clothing, and then unlawfully and wilfully desert and abandon the said infant child, and did leave the said infant child without necessary or proper food or clothing for a long space of time, to wit, for the space of four days; whereby and by reason of which said unlawful and wilful neglect, desertion, and abandonment, the said infant child then became and was greatly injured and weakened against the peace of our lady the Queen her Crown and dignity.

A second count in the indictment contained a similar charge against the prisoner for neglecting to support another of her children, being a female child of the age of five years. And there was a similar charge in a third count with respect to another of her children, being a boy of the age of three years.

It was proved upon the trial that the prisoner was the wife of a seaman in her Majesty's service, who was absent on service; that she received a portion of his pay under a power given by her husband; that she had a house to herself in which she lived with her three children—the children mentioned in the indictment; that the prisoner was able to work and get her living if she chose; was a good needlewoman, and used to work for the slopsellers.

Mary Ann Crane, a witness for the prosecution, a neighbour of the prisoner, stated that about five o'clock in the evening of the 20th December, the prisoner called on her with another woman, Mrs. *Gardner*, who came to take leave of witness. *Crane* asked prisoner

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whether she was going to stay out again all night. That the prisoner made no answer to this inquiry and went away. That about half an hour afterwards witness went to see the children, the door of the house being only fastened with a latch. Witness went in and found the children upstairs in bed. That there was no food in the house, a flock bed on the floor, with only one old bit of blanket upon it. The bed was wet. That witness gave the children a piece of bread and butter each. The little boy was crying. That witness went to them again next morning soon after five o'clock. The prisoner was not there, nor any body but the three children, who were asleep. That witness went home, and about eight o'clock made some coffee and took to them, with a piece of bread and some coals, and made a fire. That about noon witness went in again and found them alone, not in bed. That the two girls were perfectly naked, and that the little boy had nothing but a piece of an old apron about him. That she saw no other clothes that the children might have put on. That witness gave them a mess of turnips and potatoes. That at night witness begged some food for them which they had. They were alone that night as far as witness knew. That on the following morning (*Wednesday*), witness gave the children some bread, and afterwards took them to the parish workhouse. That on the next day (*Thursday*), about eight o'clock in the morning, the prisoner came to witness and asked her if she knew where her children were, and she told her. She said she went on board a barge there and they took her to *Maidstone*, and that she had walked back (being a distance of eight miles). Witness was of opinion that the children did suffer in some degree from want of proper nourishment and clothing, though not to any serious extent.

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1853. The evidence of *Mary Ann Crane* was confirmed by other witnesses.

It was therefore proved that the prisoner had left the children without food or clothing and remained absent from five o'clock on *Monday* evening till eight o'clock on *Thursday* morning. That from their tender age the children were unable to provide for themselves. That the prisoner had the means of providing for them, and that but for the attention of a poor neighbour, the children must have suffered most severely, and might probably have died for want of food, but that the children did not actually suffer any serious injury.

The Court inclined to the opinion that the conduct of the prisoner was a misdemeanor at common law. The jury thereupon found the prisoner guilty upon all the counts.

But having some doubts on the subject, the Court respite the judgment, and reserved the case for the opinion of the Court of Criminal Appeal. The doubts arose on the following points.

First. Whether the conduct of the prisoner in absenting herself as mentioned in the above statement, amounts to a misdemeanor at common law, irrespective of any actual injury to the children which might be the result. Whether, therefore, the averment in the indictment that the children were thereby "greatly injured and weakened," were material and necessary to be proved.

Secondly. If actual injury to the children is necessary in order to constitute the offence, and the averments therefore necessary to be proved; whether the injury which to some extent the children must have sustained was sufficient in degree to constitute the offence and support the averments.

Romney, Chairman.

This case was heard on the 23rd April, 1853, 1853.
before JERVIS C. J., PARKE B., ALDERSON B., PHILLPOT'S
WIGHTMAN J., and CRESSWELL J. Case.

There was no argument by counsel.

The learned Judges consulted together in their private room.

JERVIS C. J.—We are of opinion that the conviction in this case was wrong. Two questions are submitted to us.

1st. Whether the conduct of the prisoner in absenting herself, irrespective of any actual injury, is a misdemeanor at common law; and whether it was necessary to prove the averment that the children were greatly injured and weakened. That point was determined in *Hogan's case*, 2 Den. C. C. 277.

2nd. Whether the injury proved was sufficient in degree to constitute the offence. It does not appear that it was left to the jury to say what was the nature of the injury. The evidence shews that the children had suffered some injury, but not to any serious extent.

We think that an injury "to some but not to any serious extent" is not sufficient. We may adopt the language of the Judges in *Friend's case*, Russ. & R. 20. That in order to constitute an offence indictable as a misdemeanor, it is necessary to state a breach of duty or contract in refusing or neglecting to provide for an infant of tender years, unable to provide for itself, and that the health of the infant has been injured by the neglect. The Legislature in the stat. 14 & 15 Vict. c. 11, has given a guide to the amount of injury necessary to constitute an offence under that statute. In sect. 1, it makes it indictable as a misdemeanor the not providing apprentices and young persons with proper food, clothing, and lodging, "whereby the health of such person shall have been

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or shall be likely to be permanently injured," making the offence depend on the permanent injury, or on the injury to the health.

The other learned Judges concurred.

Conviction quashed.

1853.

REGINA v. ELIZABETH BROOKS.

The prisoner, a married woman, was indicted for receiving stolen goods. The evidence shewed that the property had been stolen by the husband from his employer where he worked, and afterwards taken home and given to his wife.

Held, that the prisoner could not be convicted, under the circumstances, of this offence.

THE prisoner, *Elizabeth Brooks*, was indicted at the *Liverpool* Borough Sessions, in *February* last, before *Gilbert Henderson*, Esq., Recorder of the said borough, for feloniously receiving dressing cases, bell corals, pencil cases, and other goods, the property of *Everard Eastee*, well knowing them to have been stolen. *Henry Brooks*, the husband of the prisoner, had been for several years employed as salesman by *Everard Eastee*, a shopkeeper, residing in *Liverpool*, and who dealt in dressing cases, and the other articles mentioned in the indictment. In the course of the year 1852, *Henry Brooks* stole from *Eastee's* shop the articles mentioned in the indictment, and delivered them into the hands of the prisoner, his wife. None of the articles were missed before the prisoner's apprehension, and whether they were stolen at one time, or at different times, or whether they were delivered to the prisoner at one time or at different times, did not distinctly appear. On the first suspicion of his dishonesty, *Henry Brooks* absconded, and was not subsequently taken into custody. His house was searched, and a box was there taken from the prisoner, after

some struggle on her part to retain it. This box contained a quantity of pawn tickets relating to, and which led to the discovery of the property mentioned in the indictment, and produced at the trial. Several of these pawn tickets had been given for articles which the prisoner had herself pledged, falsely stating as to some that they were birth-day presents; and as to others, that they were articles in which she dealt. In two instances the prisoner had sent different persons to pledge some of the articles produced, and had afterwards received the pawn tickets and money lent by the pawnbrokers. The prisoner, in her defence, said she did not know the things were stolen. The jury were told by the learned Recorder that as her husband had delivered the stolen articles to the prisoner, the law presumed that she acted under his control in receiving them, but that this presumption might be rebutted. If, therefore, on considering the evidence, they were perfectly satisfied that at the time when the prisoner received all or any of the articles produced she knew that they were stolen, and in receiving them acted not by reason of any control or coercion of her husband, but voluntarily, and with a dishonest and fraudulent intention, she might be found guilty. The jury, after some deliberation, returned a verdict of guilty. As the prisoner was undefended, and the learned Recorder entertained doubts as to the law, he reserved for the consideration of the Judges the questions, whether his direction was right, and whether, on the evidence stated, there was any case to have been left to the jury.

Judgment was postponed, and the prisoner committed to the *Liverpool* borough gaol until the decision of the Judges.

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On the 23rd of April, A.D. 1853, this case was

1853. argued before JERVIS C. J., PARKE B., ALDERSON B.,
 BROOKS'S WIGHTMAN J., and CRESSWELL J.

Brett, for the Crown.

JERVIS C. J.—Does any Counsel appear for the prisoner?

Brett. No, my Lord. I feel bound to state that this is a point upon which the learned Recorder entertained much doubt, and the simple question which I shall submit to the Court is, that though it be true that if a felony be committed by a *femme coverta* in the presence of her husband, the law presumes that she acted under his immediate coercion, and excuses her from punishment (1 *Hale*, 45—516; 1 *Hawk. c. 1*, s. 9); still this presumption may be rebutted by evidence, and if it appear that the wife was principally instrumental in the commission of the crime, acting voluntarily, and not by restraint of her husband, although he was present and concurred, she will be guilty, and liable to punishment. (1 *Hale*, 516).

JERVIS C. J.—Have you any authority precisely in point?

Brett. Not precisely.

PARKE B.—It is quite clear, as stated in the case before us, that the prisoner must have received the stolen goods from the hands of her husband. In that view it is difficult to see how she could be guilty of this offence.

Brett. I can only submit that the presumption, like any other presumption of law, may be rebutted. I do not think it necessary to do more than call attention to the second point, as to whether there was any evidence to go to the jury.

PARKE B.—Last assizes I directed an acquittal in a case very similar to the present.

JERVIS C. J.—This is a very clear case. It fails in both points. If there had been plenty of

evidence there would have been no case to go to the jury; but it appears there was no evidence at all. It is clear this conviction is wrong.

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PARKE B., ALDERSON B., WIGHTMAN J., and CRESWELL J. concurred.

Conviction quashed.

REGINA v. KITSON.

1853.

THE prisoner was tried before me at the last assizes for *Cambridgeshire* for arson, with intent to defraud an insurance office. At the trial it became necessary to prove the policy of insurance. No other notice had been given to the prisoner to produce it, except a notice served about the middle of the day on the day before the trial. The prisoner's residence, where the fire happened, was thirty miles from *Cambridge*. It was objected, on the part of the prisoner, that the notice was insufficient, and that parol evidence could not be received without notice to the prisoner to produce. For the prosecutor it was contended,

1. That the notice was sufficient.
2. That the indictment itself was notice.

I received the evidence, but reserved the point. The prisoner was convicted. The question for the opinion of the Court is, whether parol evidence was properly received, and whether the conviction ought to stand.

F. POLLOCK.

This case came on *May 7th, 1853*, before JERVIS

The prisoner was indicted for arson, in setting fire to his own house, with intent to defraud an insurance office, notice to produce the policy was given the day before the trial. The policy was not produced. Held, That secondary evidence of the policy was not admissible.

1853. C. J., ALDERSON B., CRESSWELL J., ERLE J., and
 KITSON'S MARTIN B.

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The following cases were cited :—*Rex v. Ellicombe*, 1 Moo. & R. 260; *Trist v. Johnson*, 1 Moo. & R. 259; *The Attorney General v. Le Marchant*, 2 Term Rep. 201; *Rex v. Doran*, 1 Esp. 127; *Rex v. Gillson*, R. & R. 138; and *Rex v. Ickles*, 1 L. C. C. 330.

Naylor, for the prisoner, was not called upon.

JERVIS C. J.—We are all of opinion that the conviction in this case was wrong, and that secondary evidence of the policy ought not to have been received. It must not, however, be understood that it is absolutely necessary in all cases to produce the policy, but the intent to defraud alleged in the indictment must be proved by proper evidence.

All the learned Judges concurred.

Conviction quashed.

SC 20 Eng L & Eq 588

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REGINA v. WELMAN.

The prisoner was indicted for obtaining money under false pretences. The evidence shewed that the prisoner in July, 1850, called upon prosecutrix

At the last *Easter Sessions* for the city of *Manchester*, holden on the 4th of April, 1853, *Harvey Welman* was tried and convicted before me for obtaining money under false pretences. The indictment against him was as follows, that is to say :

“Borough of *Manchester* in the county of *Lancaster*

and made false representations relative to a benefit club, but failed on this occasion in obtaining any money. In August of the same year prisoner again called relative to the club, and referred to the previous conversation. The jury found that the money was obtained by reason of the false pretences made in these several conversations: *Held*, that if the two conversations were connectible, it was competent for the jury so to connect them, and that the prisoner was properly convicted.

to wit The jurors for our lady the Queen upon their oath present that the late *Harvey Welman* late of the borough of *Manchester* in the county of *Lancaster* labourer on the fourth day of *August* in the year of our Lord 1850 at the borough aforesaid in the county aforesaid and in the jurisdiction of this Court unlawfully knowingly and designedly did falsely pretend to one *Jane Jackson* that there existed a certain burial society which he the said *Harvey Welman* then and there within the said jurisdiction mentioned and described to the said *Jane Jackson* and to which the said *Harvey Welman* then and there represented that he belonged composed of a number of persons associated together under certain rules and regulations and managed according to certain principles and the affairs of which were carried on and conducted under the superintendence and direction of a body of officers that its affairs were conducted in an honest business-like and respectable manner that it was a strong society that it was a rich society and that the said society had about 7000*l.* in the Bank by means of which false pretences the said *Harvey Welman* did then and there and within the said jurisdiction unlawfully and knowingly obtain from the said *Jane Jackson* a certain sum of money to wit threepence of the moneys of one *Thomas Jackson* with intent then and there and within the said jurisdiction to cheat and defraud Whereas in truth and in fact no such society as that mentioned and described by the said *Harvey Welman* to the said *Jane Jackson* either then or at any other time existed nor were its affairs carried on or conducted under the superintendence or direction of a body of officers nor were its affairs then or at any other time conducted in an honest business-like and respectable manner nor was it then or at any other time a strong or a rich society nor had the said society then or at

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1853. any other time 7000*l.* or about or nearly 7000*l.* in
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Case. any bank or banks or elsewhere all which the said
Harvey Welman then and there and within the said
jurisdiction and at the time of the making of the said
false pretences well knew against the form of the
statute in such case made and provided and against
the peace of our lady the Queen her Crown and
dignity.

2nd Count charges the same offence, without alleging
that the society was composed of a number of persons
associated together under certain rules and regulations,
and managed according to certain principles.

3rd Count charges the same offence, without alleging
that the defendant represented that he belonged to the
society, or that it was composed of a number of per-
sons associated together under certain rules and regu-
lations, and managed according to certain principles,
and the affairs of which were carried on and con-
ducted under the superintendence and direction of a
body of officers, or that its affairs were conducted in
an honest, business-like, and respectable manner.

4th Count charges the same offence, merely alleging
that a certain burial society, which the defendant
mentioned to *Jane Jackson*, was a respectable society,
that its affairs were conducted in an honest, business-
like, and respectable manner, and that it had about
7000*l.* in the Bank.

The defendant pleaded not guilty.

The indictment contained twenty-four counts, com-
prising twelve separate and distinct charges of obtain-
ing money from different persons, and on different
occasions. As appeared by the opening of the learned
Counsel for the prosecution, the indictment charged all
the offences to have been committed on the same day.
On this being stated, I told the learned Counsel that on
the authority of *R. v. Bassett*, 1 Cox C. C. 51, I should

ultimately call upon him to elect as to which case should go to the jury, but that I would not interfere with his making the fullest statement, or giving evidence on any count or counts he pleased, before electing on which charge to proceed. The learned counsel went on with his statement, and afterwards called witnesses on two other cases in the indictment, besides that to which the four counts above stated refer, one occurring eighteen months before, and the other three months after it.

The facts of the case for obtaining money under false pretences from *Jane Jackson*, charged in the counts above set forth, were as follows:—

In *July*, 1850, the defendant, *Harvey Welman*, called at the house of the prosecutrix, *Jane Jackson*, then a married woman, but now a widow; he had some cards with him; he said he belonged to a club, and was canvassing for members; he said it was called the "*Instant Benefit*;" he said it was a very strong club, they had about 7000*l.* in the Bank; he said it was a very excellent society; a strong club and very respectable. Witness declined to enter. The defendant called again upon her in a month afterwards, early in *August*. He still praised the club—said it was strong and respectable. That was all he said at that time, and she then entered herself, her husband, and one daughter as members, which she would not have done, unless the defendant had made these representations. She paid at the time one penny for each name (being the 3*d.*, for obtaining which by false pretences the prisoner is indicted). Witness mentioned that her husband's age was then fifty-two, which the defendant put down in a book, and also upon a card, which he gave to and left with her at the time, and she continued to pay as a member until her husband's death, on the 22nd *June*, 1852. On

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that evening she called on defendant to acquaint him with her husband's death. He said he would call next morning, and she must find the card which she had not brought with her. He did call next morning, and she gave him the card, which he examined for twenty minutes, and then said her husband was above fifty when he entered, and ought to have paid 2d. instead of 1d. She replied she had paid all that he demanded, and that if he had demanded more at the time of entry, she would have paid it. He then said she was only entitled to 4*l.* 10*s.* instead of 5*l.*, in consequence of that penny not having been paid. Defendant then offered her a receipt for 5*l.*, which he wanted her to sign. She said she would not sign for 5*l.* If he would alter the figures to 4*l.* 10*s.*, and give her the money, she would sign for that, but she should still look after the ten shillings. He then said he would not give her a farthing. She did not sign any receipt. He went away, and she never got a farthing. She afterwards went to *Carpenters' Hall* on the second *Thursday* in *July*, understanding it to be a quarterly meeting. Defendant, *Samuel Clegg, Moon and Heywood*, were there. She applied to them for the money. Defendant said he would never give her a farthing, and would send for a policeman to turn her out, and she got no satisfaction. The card left by defendant with *Jane Jackson*, when she became a member, was a printed one, and had on it : " *Instant Benefit. The General Assurance Burial Society held at Carpenters' Hall, Brook Street, Manchester. Office, 7, Cobden Street, Gartside Street. Superintendent director, Harvey Welman, 7, Cobden Street. President, Samuel Clegg, 9, Granby Row. Secretary, William F. Heywood, Thompson Street, Oldham Road.*" and it appeared that these three persons filled their respective offices in the society at the time *Jane Jackson* became a member

of it, and their respective addresses were correctly stated. There was printed on the card, "In cases of dispute fair arbitration will be allowed." It also contained the rates of payments, according to the ages of the members, and two or three weeks after she entered her husband's name she discovered that the payment for him ought to have been two pence, instead of a penny, but she did not think it was her place to mention it, as only a penny had been demanded. She never asked for an arbitration, nor was it mentioned to her. She paid her subscriptions for the first three months to the defendant, and afterwards to *Heywood*, the secretary. After defendant examined her card he said he would give her 4*l.* 10*s.*, but did not offer the money. She joined the society, expecting that in the event of the death of her husband or child, she should get the burial money.

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Certain printed rules were put in on the part of the prosecution.

"Rule 7.—This society shall be governed by a board of directors, namely, the founder of the society (which was the defendant), who shall be the superintending director, secretary, president, senior collector, and five heads of families, chosen from the body."

No heads of families were ever so appointed, and it did not appear that any member had ever applied to have such appointment made. The defendant, as superintending director, managed and controlled everything. *Samuel Clegg* was appointed by defendant as president and canvasser in 1849. He continued to canvass until about a year ago, when he left the society, and during that time enrolled one thousand members. Besides the quarterly meetings, he attended a meeting at *Carpenters' Hall*, every Thursday evening, from seven till nine. The rules, as well as cards of membership, were on the table at these

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1853. meetings. The collectors brought their books there, which were examined by the defendant. The money collected was paid over to him, and he entered it in his book. This book was produced at the trial. It contained entries of receipts and disbursements, including burial money. Four instances of payments for burial money occurred in one page. At the time of the prisoner's apprehension on this charge, this book showed a balance of 39*l.* 18*s.* 8*d.* in favour of the society, and it was shewn that in two instances within the knowledge of *Clegg*, defendant *Welman* had paid burial money where the parties were out of benefit, that is, not entitled, by reason of some irregularity, to enforce such payment.

The other officers of the society, namely, *Joseph Moor*, who succeeded *Clegg* as president, and *Heywood*, the secretary, were called, and proved the superintending director to have been the sole director, and to have managed everything : but neither they nor *Clegg* ever heard or saw any banking book belonging to the society, or ever knew themselves or heard from *Welman* of a sum of 7000*l.*, or any sum of money whatever, belonging to the society, being in any bank.

This was the case.

The prisoner's counsel addressed the jury.

I summed up the case, telling the jury that I thought they might take into account what passed at the first meeting between defendant and *Jackson*, as well as what passed at the time, when the three pence was paid by her ; but that before they could convict the defendant they must be satisfied that these representations were false ; that they were made by the defendant knowing them to be false, with the view to induce *Jane Jackson* to pay this entrance money to become a member ; that she was induced by these representations

to do so; and that he intended at the time that she never should reap any benefit from such membership.

The jury found the defendant guilty.

I reserved the judgment until the opinion of the Court of Criminal Appeal could be taken.

The questions for the opinion of the Court are:—

1st. Whether on the facts stated there was a case within the statute which I ought to have left to the jury at all.

2nd. Whether I was right in telling the jury that they might consider what passed at the first and second meeting between defendant and *Jackson* as one continuing representation.

The point that was raised with reference to the indictment in this case may not be brought before the Court in such a way as to call for their decision upon it; but I venture to submit that is of very great importance indeed to Courts of Quarter Sessions to have the authority of the case of *Rex v. Bassett* decided one way or other.

R. B. Armstrong,

Recorder of Manchester.

The defendant *Welman* is in custody for want of bail.

R. B. Armstrong, 20th April, 1853.

This case was argued on the 7th May, 1853, *coram JERVIS C. J., ALDERSON B., CRESSWELL J., ERLE J., and MARTIN B.*

Wheeler for the prisoner. It is submitted that the conviction is wrong. There are two questions for the consideration of the Court.

1st. Whether the offence alleged comes within the statute.

2nd. If there was any evidence for the jury.

As to the first point there appears a difference between the facts alleged in the indictment and as

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proved by the evidence of *Jane Jackson*. Upon the first occasion the prisoner told *Jackson* it was a very strong club, that they had about 7000*l.* in the Bank, that it was a very excellent society, and very respectable. This conversation took place in *July*, and upon that occasion it is clear that the prosecutrix was not influenced by the representations of the prisoner; for at that time she declined to have anything to do with the club. Upon the second occasion, the defendant called upon the prosecutrix in *August*, and then merely represented that the club was strong and respectable, and, in consequence of this second conversation, prosecutrix entered herself, her husband, and her daughter as members. It is submitted that the representations made at the second interview, and which alone can be said to have influenced the prosecutrix, were true, anyhow were not false pretences within the statute. The prisoner was a mere canvasser for the society, and makes a statement which may be said to be exaggerated and coloured; but similar statements are made every day in reference to the publication of books, or in the statements of auctioneers in making sales, or horse dealers in selling horses. It is indeed a species of puffing, and nothing more. The false pretences must be kept within definite limits, and if every exaggerated statement, or highly coloured representation were held to be within the statute, we should be involved in all kinds of difficulties. In addition I would submit that it must be a false pretence of some existing fact within the knowledge of the person making it is false.

JERVIS C. J.—That proposition is not quite true.

ERLE J.—I have always understood that the false pretence must be of a past fact, and not of something in future.

WHEELER. In *Woolley's case*, 1 Den. C. C. 560, it is said, "If A. fraudulently represents as an existing

fact that which is not an existing fact, and so gets money, that is a false pretence within the statute." The money must be obtained by means of the false pretence. In the present case there are two conversations at the interval of a month, and it is contended that those conversations in point of law are not connectible. The false representations, if any, were in the first conversation, and it is clear that those did not operate upon the mind of the prosecutrix. It would be very hard to hold a person liable for a conversation in *July*, upon a statement made in *August*, because they might possibly have a remote connection. Admitting that the statement in *July* was false, the prisoner before *August* may have repented, and surely there ought to be a *locus penitentiae*.

CRESSWELL J.—You do not appear to recollect that upon the second occasion the prisoner referred to the club of which he had made the false representations in the first conversation.

Wheeler. It is submitted that the prosecutrix advanced her money in the hope of getting her burial money in the event of the children's death. And that would be a promise *in futuro*.

ALDERSON B.—Surely not. Supposing a person brings me a cheque, and I cash it by reason of false representations, would it be said that I did not cash it by reason of the false pretences, because I expected it would be paid when presented at the Bank.

CRESSWELL J.—The jury, by the conviction, have found that the money was obtained by reason of the false pretences.

JERVIS C. J.—The question is, whether the two statements are connectible.

ALDERSON B.—If there be an interval of time between two representations, it is a question for the jury to say whether they are connected.

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1853. *Wheeler.* On the second occasion the prisoner said

WELMAN'S Case. nothing about the club having 7000*l.* He cannot therefore be taken to have adhered to that statement.

JERVIS C. J.—As to the second point, the question is, was the learned Recorder right in telling the jury that they might consider the first and second conversations, as one continuing representation? I think

~~the~~ there was. If the representations were connectible, it was for the jury to determine whether they were connected. The other question is, whether, on the facts, there was a case to go to the jury. Assuming that they might connect the two statements, I think there was a case for them. To support an indictment for false pretences, there must be a knowingly false statement of a supposed bygone or existing fact, made with intent to defraud, and an obtaining of the money by means of that representation. Here the statement that the society had 7000*l.* in the bank was an untrue one, and had it been true, it was a fact calculated to have influenced the mind of the party to whom it was made, and the jury have found by their verdict that it did so influence the mind of the prosecutrix.

The other Judges concurred.

Conviction affirmed.

1853.

REGINA v. JOHN CLARK AND OTHERS.

C. was charged with others in the first count

THE prisoner *Clark* was convicted at the *Middlesex May Sessions*, 1853, of felony, after a previous con-

of an indictment with larceny from the person. The indictment contained two other counts, each charging a previous conviction against *C.*

Held, That any number of previous convictions may be alleged in the same indictment, and, if necessary, proved against the prisoner.

viction, subject to the opinion of this Court, upon the following case :—

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CLARK's
Case.*Middlesex Sessions, May, 1853.*

The four undermentioned prisoners were tried at the General Sessions for *Middlesex* upon the following indictment :—

“ The jurors &c. on their oath present that *John Clark, Emma Freeman, Edward Maynard and Mary Ann Williams* on &c. one purse and six shillings in money of the property of *Ann Smith* from her person feloniously did steal take and carry away against &c.

“ And the jurors aforesaid upon their oath aforesaid do further present that before the time of the committing of the felony hereinbefore mentioned that is to say at the adjourned general sessions of the peace held on &c. at &c. the said *John Clark* by the name of *Benjamin Hunter* was convicted of felony.

“ And the jurors aforesaid upon their oath aforesaid do further present that before the time of the committing the felony first hereinbefore mentioned that is to say at the general sessions held at &c. on &c. the said *John Clark* by the name of *John Ballboy* was convicted of felony.”

The prisoner *Clark* was arraigned in the usual way upon the whole indictment, and pleaded not guilty to all the charges. The jury returned a verdict of guilty against all the prisoners on the count for larceny from the person, and was then charged to inquire at the same time of both the convictions; and evidence was offered and not objected to as to both, and the jury returned a verdict of guilty against *Clark* upon both.

The Counsel for the prisoner then contended,—

First. That the statement of two convictions against one prisoner vitiated the indictment as against all the

1853. four prisoners, and that the judgment must be arrested generally.

CLARK'S Case. Secondly. That if it did not affect all the prisoners, it vitiated the indictment as against *Clark*, and that the judgment must be arrested as against him.

Thirdly. That at all events the judgment must be arrested as far as regarded the previous convictions for felony, and that judgment could only be pronounced against *Clark* upon the count for larceny from the person.

The judgment has been respited upon all the prisoners, and they were committed to prison to abide the judgment upon this case.

John Adams, Assistant Judge.

This case was argued on the 4th of June, 1853, before Lord CAMPBELL C. J., PARKE B., MAULE J., TALFOURD J., and MARTIN B.

June 4th. • *Metcalfe* for the prisoner. The prisoner *Clark* was convicted under the stat. 7 & 8 Geo. 4, c. 29, s. 11, and I submit that the statement of the offence for which the prisoner was to be tried, and the allegations of a previous conviction would constitute one charge, and that if more than one previous conviction is alleged, the indictment is bad.

Lord CAMPBELL C. J.—The statement of a previous conviction is hardly a matter of charge, as it is not to be laid before the jury to induce them to convict. It is only to influence the Judge in the quantum of punishment; and the number of times that a prisoner had been convicted might be very material for the Judge.

Metcalfe. It might influence the grand jury in finding the bill.

Lord CAMPBELL C. J.—Not if they do their duty.

They are to see that there is *prima facie* evidence to support each allegation that they find.

Melcalfe. I submit that there can be only one charge in the indictment consisting of the new offence and one previous conviction.

TALFOURD J.—It may be that the counsel for the prosecution might be put to elect in the same way as if two felonies were put in one indictment. But that would be no objection to the indictment itself.

MAULE J.—It might put the prosecutor to elect which of the two previous convictions he would go upon.

Melcalfe. From the cases of *Rex v. Tandy*, 2 Leach, 833, and *Rex v. Robinson*, 1 M. C. C. 413, it appears that a double uttering of counterfeit coin must be charged in one count.

Lord CAMPBELL C. J.—A statement of a previous conviction does not charge an offence. It is only the averment of a fact which may affect the punishment. The jury do not find the person guilty of the previous offence: they only find that he was previously convicted of it as an historical fact.

MARTIN B.—The coin acts make the double uttering an offence.

Lord CAMPBELL C. J.—They alter the offence and not merely the measure of punishment.

Melcalfe. If the statement of two previous convictions is wrong, I submit that no judgment can be given on the first count. In the case of *Rex v. Turner*, 1 M. C. C. 47, the prisoner was charged with uttering counterfeit coin after two previous convictions which were badly stated, and the judgment was arrested.

MAULE J.—There the woman was indicted for felony, and it would have been only a misdemeanor without the previous convictions.

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Case.

1853. *Metcalfe.* In the case of *Rex v. Pewtress*, 2 Str. 1026, it was held that the Court could not strike out any of the counts of the indictment.

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Lord CAMPBELL C. J.—As no judgment has been given in this case, we cannot interpose *hoc statu*: but as this is a question of importance, the Judges will give their opinions. I am of opinion that there may be several previous convictions lawfully set out in one indictment. They do not vary the offence; they only affect the quantum of punishment. There is no rule against alleging several previous convictions, and although the stat. 6 & 7 Wm. 4, c. 111, only mentions one previous conviction, the stat. 14 & 15 Vict. c. 19, s. 9, enacts that if the prisoner shall give evidence of his good character, the prosecutor may give evidence of the conviction of such person for the previous offence *or offences*. Independently of this, I think that the several previous convictions should be alleged in cases where they exist. A difficulty as to the proof of identity may occur as to one conviction and not as to another, and it is also very important that the Judge should know how many times a prisoner has been convicted.

PARKE B. concurred.

MAULE J.—There is no rule that redundancy of allegation is prejudicial to an indictment. It may be that if several offences are charged, those offences may not have been committed, but if several previous convictions are charged, it is highly improbable that they should not have occurred, and even if one were stated that had not occurred, it would not prejudice the prisoner.

MARTIN B. and **TALFOURD J.** concurred.

Conviction affirmed.

*SR 1 CCR 172*REGINA *v.* DAVID WHITE.1853.

THE prisoner was convicted at the *Berwick-upon-Tweed* Sessions, in April, 1853, subject to the opinion of the Court, upon the following case:—

The prisoner was indicted at the last Quarter Sessions for *Berwick-upon-Tweed*, for stealing 5000 cubic feet of carburetted hydrogen gas, of the goods, chattels and property of *Robert Oswald* and others. Mr. *Oswald* was a partner in the *Berwick Gas Company*, and the prisoner, a householder in *Berwick*, had contracted with the company for the supply of his house with gas, to be paid for by meter. The meter which was hired by the prisoner of the company, was connected with an entrance pipe through which it received the gas from the company's main in the street, and an exit pipe through which the gas was conveyed to the burners. The prisoner had the control of the stop-cock at the meter, by which the gas was admitted into it through the entrance pipe, and he only paid the company, and had only to pay them for such quantity of gas as appeared by the index on the meter to have passed through it. The entrance and exit pipes were the property of the prisoner. The prisoner, to avoid paying for the full quantity of gas consumed, and without the knowledge or consent of the company, had caused to be inserted a connecting pipe with a stop-cock upon it, into the entrance and exit pipes, and extending between them; and the entrance pipe being charged with the gas of the company, he shut the stop-cock at the meter, so that gas could

It appeared that the prisoner, without the knowledge or consent of a gas company, caused to be inserted a connecting pipe, with a stop cock upon it, into the entrance and exit pipes, and extending between them. And the entrance pipe being charged with the company's gas, he shut the stop cock of the meter, and so consumed the gas without its passing through the meter.

Held, That the prisoner was properly convicted of larceny, and that there was a sufficient severance of the gas in the entrance pipe to constitute *an asportavit*.

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Case.

not pass into it, and opened the stop-cock in the connecting pipe, when a portion of the gas ascended through the connecting pipe into the exit pipe, and from thence to the burners, and the gas was consumed there, and the gas continued so to ascend and be consumed, until by shutting the stop-cock in the connecting pipe the supply was cut off. And this operation was proved to have taken place at a time specified by the prosecutor. It was contended for the prisoner that the entrance pipe into which the gas passed from the main being the property of the prisoner, he was in lawful possession of the gas by the consent of the company, so soon as it had been let into his entrance pipe out of their main, and that his diverting the gas in its course to the meter, was not an act of larceny.

I told the jury that if they were of opinion on the evidence that the entrance pipe was used by the Company for the conveyance of their gas by the permission of the prisoner, but that he had not by his contract any interest in the gas or right of control over it until it passed the meter, his property in the pipe was no answer to the charge; that there was nothing in the nature of gas to prevent it being the subject of larceny, and that the stop-cock on the connecting pipe being opened by the prisoner, and a portion of the gas being propelled through it by the necessary action of the atmosphere, and consumed at the burners, there was a sufficient severance of that portion from the volume of gas in the entrance pipe to constitute an *asportavit* by the prisoner, and that if the gas was so abstracted with a fraudulent intent, he was guilty of larceny.

The jury answered the questions put to them in the affirmative, and found the prisoner guilty. I postponed judgment, taking recognizance of bail according to the statute for the appearance of the prisoner at the

next session to receive judgment if this Court should be of opinion that he was rightly convicted.

1853.

WHITE'S
Case.

Robert Ingham,
Recorder of Berwick-upon-Tweed.

This case was argued on the 4th of June, 1853, before Lord CAMPBELL C. J., PARKE B., MAULE J., TALFOURD J., and MARTIN B.

Ballantine for the prisoner. The gas here was delivered by the company at the discretion of the consumer, and he avoids accounting correctly by avoiding the meter. This is made a specific offence, subject to a pecuniary penalty by the company's act, as it also is by the Gas Works Clauses Act, 10 Vict. c. 15, s. 18, and that is the offence that has really been committed here. In larceny there must be a virtual or constructive taking out of the possession of the owner, and against his will.

Lord CAMPBELL C. J.—It was *invito domino*.

Ballantine. It was *invito domino* that the gas was not accounted for. There is a delivery to any extent that the consumer chooses, if he does but account for it by the meter, and the principle of the meter is that the consumer may take whatever amount he pleases, and the consumer here only practises deception as to the quantity used, and there is no fraud to obtain the delivery.

MARTIN B.—If there was a spout in a stable to get corn from a bin, and the ostler by boring a hole higher up got the corn out and took it away for himself, would not that be a larceny?

Ballantine. Here everything taken goes into the possession of the prisoner by the consent of the original owner, and no fraudulent representation is made. The owner parts with the property without any fraudulent inducement being held out to him, and if this be a

1853. larceny the provisions in the acts of Parliament which I have cited are superfluous.

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MAULE J.—Those acts of Parliament may be applicable to cases where the act done would not be larceny, as if the prisoner had altered the machinery of his meter, and had made it register wrong, like the unjust steward who put down a less sum.

Lord CAMPBELL C. J.—I am of opinion that this conviction ought to be confirmed. The direction of the Recorder was most correct, and entirely according to law. There may be larceny of gas as well as of wine or of oil. In the present case, this gas was not put into the possession of the prisoner, but was in the possession of the company, and the prisoner carried it away, having an *animus furandi*, and converted it to his own use. It was the gas of the company, and its being in the prisoner's pipe makes no difference. There is nothing in the nature of gas to make it not the subject of larceny, and by means of the stop-cock it was abstracted. I think that the direction of the Recorder was according to law, and that the evidence abundantly supports the conviction. With respect to the acts of Parliament which have been referred to, my Brother MAULE has, I think, given the correct explanation; but even if the Legislature had made this a distinct offence, it would not be the less a larceny.

PARKE B., MAULE J., MARTIN B., and TALFOURD J. concurred.

Conviction affirmed.

*LB/CCHs 282
1Bish Co-Law § 315.*

REGINA v. CHARLES HOLMES.

1853.

THE defendant was convicted at the *Middlesex May Sessions*, 1853, subject to the opinion of this Court, upon the following case :—

Middlesex Sessions, May, 1853.

Charles Holmes was indicted for that he “in a certain public vehicle or conveyance called an omnibus and employed for the purpose of carrying passengers for hire and frequented and used by divers liege subjects of our said lady the Queen passing and repassing in and out of the said vehicle in the sight and view of *A. B.* and *C. D.* and divers of the liege subjects of our said lady the Queen, in the said omnibus, then and there being unlawfully wickedly and scandalously did expose to the view of the said persons so present as aforesaid the body and person of him the said *Charles Holmes* naked and uncovered for a long space of time to wit for the space of half an hour to the great scandal of the said liege subjects of our said lady the Queen and against the peace of our said lady the Queen her Crown and dignity.”

In a second count the offence was charged as having been committed in a certain public and common highway, called the *New Road*, in the presence of divers liege subjects, &c., and concluded like the first count, “to the great scandal of the said liege subjects of our said lady the Queen and against the peace of our said lady the Queen her Crown and dignity.”

It was proved in evidence that the prisoner was a passenger in a public omnibus for hire, and that he exposed his person for a considerable distance whilst

The prisoner was indicted for a misdemeanor at common law, for an indecent exposure of his person in a public omnibus, in the presence and view of several persons.

Held, That an omnibus is a public place sufficient to support the indictment, and that since the 14 & 15 Vict. c. 100, an indictment for a public nuisance need not conclude *ad communem nocumentum.*

HOLMES'S Case. the omnibus was passing along the *New Road* in the presence of three or four females who were passengers therein, and who saw such exposure.

It was contended, on the part of the prisoner, that an omnibus was not a public place, and that the indictment was bad in law, as it did not conclude "*ad commune nocumentum*," but only to the great scandal of the said (that is of divers) liege subjects of our lady the Queen.

The jury found the defendant guilty, and the above points were reserved by the Court.

Judgment was postponed, and the defendant was committed to prison to abide the decision of this case.

John Adams, Assistant Judge,

May 5, 1853.

This case was argued on the 4th of June, 1853, before Lord CAMPBELL C. J., PARKE B., MAULE J., TALFOURD J., and MARTIN B.

Ballantine, for the defendant. There is a distinction between a private exposure and a public nuisance. Is an omnibus a public place ? I submit that it is not. It is private property, used by the public as a public house is, and the bar of a public house is held not to be a public place in the case of *Reg. v. Webb*, 2 C. & K. 933, although by law public houses are to receive guests. So in the case of *Reg. v. Orchard*, 3 Cox C. C. 248, an exposure in a public urinal in *Farringdon Market* was held not to be indictable.

Lord CAMPBELL C. J.—In that place the person must of necessity be exposed.

Ballantine. An exposure in a private place, or for private annoyance, is not indictable: neither is an exposure to one person only ; *Reg. v. Watson*, 2 Cox C. C. 376. In all cases of nuisance the offence must be in a public place, and *ad commune nocumentum*. In the case of *Rex v. Crunden*. 2 Camp. 89, bathers

at *Brighton* were held to be indictable, because the place was a public one, but in the case of *R. v. Lloyd*, 4 Esp. 200, a nuisance by a tinman was held not indictable, because it only annoyed a few persons who resided at Nos. 13, 14, and 15, *Clifford's Inn*. I submit that, to be an offence, the act must be done in a public place so as to be a nuisance, and that the indictment must conclude *ad commune nocumentum*.

Lord CAMPBELL C. J.—Is not the last objection cured by the 25th section of the stat. 14 & 15 Vict. c. 100?

MARTIN B.—The precedent in Mr. *Archbold's* work does not conclude *ad commune nocumentum*.

Lord CAMPBELL C. J.—This is an offence against public decency, rather than a common nuisance.

Ballantine. I submit that it is to be treated as a nuisance or it is no offence; and if so, the “*ad commune nocumentum*” is of the essence of the indictment, and that therefore the objection does not admit of the answer suggested by **Lord CAMPBELL**.

Parry, for the prosecution, was stopped by the Court.

Lord CAMPBELL C. J.—We are to consider whether these counts are good, and whether they can be supported. It would be a disgrace to the law if we had any doubt that both counts are good. The defendant exposed himself in a public omnibus in the *New Road*, in the presence of several women, and this country would not be fit to live in if this were not an offence.

PARKE B.—I think that this omnibus was a public place, and that an exposure there to more than one person is an offence. The only remaining question is whether it is necessary for the indictment to conclude *ad commune nocumentum*. I think that the act of Par-

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liament which has been referred to is decisive as to that objection.

MAULE J., MARTIN B., and TALFOURD J. concurred.

Conviction affirmed.

1853.

REGINA v. GOODENOUGH.

The prisoner, who was clerk to the prosecutor, was indicted in three different counts for embezzling certain moneys belonging to his master.

The evidence shewed that the prisoner had received at different times several sums of money from the prosecutor, a dealer in skins, for the purpose of purchasing skins. The prisoner obtained the skins on credit, and applied the money to his own use, but debited prosecutor in his day cash book with several sums of money as having been paid for the skins.

At the General Sessions of the peace of our lady the Queen, held at the Castle of *Exeter*, in and for the county aforesaid, on *Tuesday, 1st March, 1853*, before *Montague Baker Bere, Esq., Baldwin Fulford, Esq., and others* their companions, justices of our said lady the Queen, assigned to keep the peace of our said lady the Queen in and for the county aforesaid, and also to hear and determine divers felonies, trespasses and other misdemeanors in the said county committed.

Henry Harris Goodenough was tried upon the following indictment, to which he pleaded Not Guilty.

Devon.] The jurors for our lady the Queen upon their oath present that *Henry Harris Goodenough* late of the parish of *Sampford Spiney* in the county of *Devon* labourer on the 8th day of *October A.D. 1852* at the parish aforesaid in the county aforesaid was employed in the capacity of a servant to *Joseph Hamlyn* and others and that the said *Henry Harris Goodenough*

The jury found the prisoner not guilty of embezzlement, but guilty of larceny.
Held: That the conviction was wrong.

did then and there by virtue of his said employment and whilst he was so employed as aforesaid receive and take into his possession certain money to a large amount to wit to the amount of twenty shillings for and in the name and on the account of the said *Joseph Hamlyn* and others his masters and the said money then and there fraudulently and feloniously did embezzle. And so the jurors aforesaid upon their oath aforesaid do say that the said *H. H. Goodenough* then and there in manner and form aforesaid the said money the property of the said *Joseph Hamlyn* and others his said masters from the said *Joseph Hamlyn* feloniously did steal take and carry away against the form of the statute in such case made and provided and against the peace of our lady the Queen her Crown and dignity.

And the jurors aforesaid upon their oath aforesaid further present that the said *Henry Harris Goodenough* afterwards and within six calendar months from the time of the committing of the said offence in the first count of this indictment charged and stated to wit on the 13th day of *October A.D. 1852* was again employed in the capacity of a servant to the said *Joseph Hamlyn* and others and that the said *H. H. Goodenough* did then and there by virtue of his said last mentioned employment and whilst he was so employed as last aforesaid receive and take into his possession certain other money to a large amount to wit to the amount of one pound six shillings for and in the name and on the account of the said *Joseph Hamlyn* and others his masters and the said last mentioned money then and there and within the six calendar months fraudulently did embezzle. And so the jurors aforesaid upon their oath aforesaid do say that the said *H. H. Goodenough* then and there in manner and form last aforesaid the said last mentioned money the

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property of the said *Joseph Hamlyn* and others his said masters from the said *Joseph Hamlyn* and others feloniously did steal take and carry away against the form of the statute in such case made and provided and against the peace of our lady the Queen her Crown and dignity.

And the jurors aforesaid upon their oath aforesaid further present that the said *Henry Harris Goodenough* afterwards and within six calendar months from the time of the committing of the said offence in the first count of this indictment charged and stated to wit on the 20th day of *October A.D. 1852* was again employed in the capacity of a servant to the said *Joseph Hamlyn* and others and that the said *H. H. Goodenough* did then and there by virtue of his last mentioned employment and whilst he was so employed as last aforesaid receive and take into his possession certain other moneys to a large amount to wit to the amount of one pound twelve shillings for and in the name and on the account of the said *Joseph Hamlyn* and others his masters and the said last mentioned moneys then and there and within the said six calendar months fraudulently and feloniously did embezzle. And so the jurors aforesaid upon their oath aforesaid do say that the said *H. H. Goodenough* then and there in manner and form last aforesaid the said last mentioned money the property of the said *Joseph Hamlyn* and others his said masters from the said *Joseph Hamlyn* and others feloniously did steal take and carry away against the form of the statute in such case made and provided and against the peace of our said lady the Queen her Crown and dignity.

The following was the case proved in evidence in support of the indictment so far as is material to the question reserved.

The prosecutor, *Joseph Hamlyn*, is a woolstapler,

carrying on business in copartnership with *John Hamlyn* and *Wm. Hamlyn*, at *Horrabridge*, in the parish of *Sampford Spiney*, in the county of *Devon*. The prisoner had been for many years past in his employment as a clerk and general servant, his duties being to keep three books, *viz.*, the day cash book or market book, the cash book and ledger, and to attend the neighbouring markets, *viz.*, *Tavistock* and *Callington* markets, both towns being within a few miles of prosecutor's place of business, for the purpose of buying skins and whatever else his employer might require. Before going to market the prosecutor was in the habit of giving the prisoner either money or a cheque on his bankers to defray the expenses of the day; and it was the prisoner's duty either to deliver what goods he purchased and to account for the money so received the same evening or the next morning in a book kept for that purpose, and to pay over to the prosecutor the surplus of the money so received and not expended. This was not however always strictly done. It was his duty to enter all payments or receipts made and received by him in the course of his employment in his day cash book or market book, thence carrying them into a book called the cash book, and thence into a book called the ledger. It was the prisoner's duty, in the course of his employment, to pay ready money for the skins and all articles he purchased, and he had not the prosecutor's authority to buy any skin or skins on credit. On *Friday*, the 8th *October*, 1852, the prisoner, having an admitted balance of cash belonging to prosecutor in his hands of 11*l.* 11*s.* 1*d.*, requested prosecutor for a further advance of cash, which prosecutor agreed to, and gave prisoner a cheque upon his bankers for 10*l.*, for the purpose of being expended in the course of his said employment on that occasion, as he was then

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about to attend *Tavistock Market* in the course of his said employment, which said cheque was given to and cashed by the prisoner. He entered the 10*l.* to his debit in his account in the day cash book or market book, which he delivered to the prosecutor on the next day, and made, amongst other entries of payments made to butchers at the *Tavistock Market* (with which he debited the prosecutor), the following:

“ Oct. 8, 52, *Tavistock*,

“ Richard 5 sheep 4*s.* - £1 0 0.”

The prisoner having debited the prosecutor in the day cash book or market book with this payment (1*l.* to *Richard*), and several other sums to different butchers, amounting in the whole to 13*l.* 8*s.* 4*d.*, as the payments for skins of this day's market, then carries this sum, 13*l.* 8*s.* 4*d.*, as having been paid by him this day, into the cash book (in his own manuscript), and on the other side of the account gives prosecutor credit for the before mentioned balance of 11*l.* 1*s.* 1*d.*

On Wednesday, 13th *October*, 1832, the prisoner attended *Callington Market*, in the course of his said employment, having in his hands an admitted balance from *Tavistock Market* (8th *October*, 1852), of 8*l.* 2*s.* 9*d.*, and having received in the interim a cheque from prosecutor for 20*l.*, and cash from a Mr. *Willcocks*, 8*l.*, for the use of the prosecutor. On the next day he made, amongst other entries of payments with which he debited the prosecutor on this occasion, the following :

“ October 13, *Callington Market*,

“ Jones 6 sheep 4*s.* - - - £1 4 0

“ 1 s lamb 2 - - - 0 2 0,”

amounting to 1*l.* 6*s.*, as paid to *Jones*, and several

other sums to different butchers, amounting in the whole to 11*l.*, as payments for skins of this day's market. The prisoner then carries this sum, 11*l.*, as having been paid by him this day into the cash book (in his own manuscript), and on the other side of the account gives prosecutor credit on 9th *October*, 1852, for the said cheque, value 20*l.*, and 8*l.* received by him of *Willcocks*.

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On Wednesday, the 20th *October*, 1852, the prisoner attended the *Callington Market* in the course of his said employment, having in his hand a balance of 28*l.* 6*s.* 4*d.* in cash, after giving prisoner credit for several payments made by him from prosecutor, including the payments made by prisoner on the last *Callington Market* day (13th *October*, 1852), and between the said 13th *October* and 20th *October*, 1852, amounting in the whole to 24*l.* 8*s.* 2*½d.*, prisoner having received two cheques from prosecutor, one for 35*l.*, the other for 17*l.*, the first dated the 15th *October*, 1852, and the second dated 20th *October*, 1852, which said cheques the prisoner cashed for the purpose of being expended in the course of his said employment on that occasion ; and in his account in the day cash book or market book, delivered to the prosecutor on the next day, he made, amongst other entries of payments to butchers, with which he had debited the prosecutor, the following :

“ *October* 20th, 1852,
“ *Callington Market*,
“ *Spear* 8 do. 4*s.* - - - £1 12 0.”

The prisoner having debited the prosecutor in the day cash book or market book with this payment as paid to *Spear*, amounting to 1*l.* 12*s.*, and several other sums to different butchers, amounting in the whole to 10*l.* 1*s.* 10*½d.*, as the payments for skins of

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—
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this day's market. The prisoner then carries this sum, 10*l.* 1*s.* 10*½d.*, as having been paid by him this day, into the cash book (in his own manuscript), and on the other side of the account gives prosecutor credit on the 15th *October* and 20th *October*, 1852, for the said two cheques, value respectively 35*l.* and 17*l.*

The prisoner, in addition to these entries in the day cash book or market book on the three several occasions before mentioned, and also in the cash book in his own handwriting entered (*inter alia*) the said sums of 1*l.*, 1*l.* 6*s.*, and 1*l.* 12*s.*, as paid on the said three several occasions to *Richard, Jones*, and *Spear*, although these sums had never been paid by the prisoner, and although the goods were duly delivered to the prosecutor. It was proved that he had not made either of these payments. On the contrary, without the prosecutor's knowledge or authority, on the 8th, the 13th, and 20th days of *October*, 1852, he had agreed with the several parties, *Richard, Jones*, and *Spear*, to pay for the skins, the subject of these entries, at the end of the quarter, and not at the time the purchases were made; and that these transactions should not be for ready money. It was also proved, that in consequence of the prisoner being back in his accounts, he was to receive no salary from *Lady Day*, 1852.

The prosecutor has since paid *Richard, Jones*, and *Spear* the before mentioned sums. The prosecutor having discovered that the payments to *Richard, Jones*, and *Spear* had not been made, he expostulated with the prisoner, who suddenly, in *November*, left prosecutor's house without any previous intimation to prosecutor, his workmen or servants. He returned again in a day or two and had an explanation with prosecutor.

The Counsel for the prisoner, at the close of the case for the prosecution, contended,—

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First. That the facts proved did not constitute embezzlement.

Secondly. That they did not amount to a larceny.

The Court, after hearing the Counsel for the Crown upon these objections, was of opinion that the prisoner took the money in question in each case in such a manner as to amount in law to a larceny, and so directed the jury.

The Court also told them, that supposing they were of opinion from the evidence that the three several sums of money, or any one of them, were given to the prisoner as servant to pay his master's bills, and he appropriated these moneys to his own use, and that at the time he received them he intended to convert them to his own use, the offence of larceny would be made out.

The Court also told them, that if a master placed money in a servant's hands for the purpose of paying bills, and he applied the same to his own use, he was guilty of larceny, as the money was never out of the master's possession, and that if they thought the prisoner had received the money with the intention of appropriating it, or any part of it, to his own use, he was guilty of larceny, and that no subsequent intention to return the money would alter the character of the original taking, which constituted the crime.

The jury found the prisoner guilty of larceny as a servant; not guilty of embezzlement.

At the request of the prisoner's Counsel, the Court respited the judgment, and reserved the question, whether the prisoner was convicted according to law, for the opinion of the Judges of the Court of Appeal, which opinion is now requested.

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The prisoner was discharged on recognizances to appear and receive judgment when called upon.

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Baldwin Fulford, Chairman.

No Counsel appearing, this case was considered on the 4th of *June*, 1853, by the following Judges:— CAMPBELL C. J., PARKE B., MAULE J., TALFOURD J., and MARTIN B.; and they held the conviction wrong.

Conviction quashed.

REGINA v. SNELLING.

1853.

On the 30th of *March* last, the prisoner called at the bank of Messrs. *Alexander* at *Hadleigh*, where Mr. *Ramsey*, a farmer at *Holton*, kept an account, and said that she had called for 800*l.* which she had deposited with Mr. *Ramsey*; that Mr. *Ramsey* had told her she might have it if she called, but that she did not know whether it was in her name or his. The clerk told her that he could not pay her without an order; to which she replied, that Mr. *Ramsey* had said an order would not be necessary, and went away. Upon the next day she came again to the bank, and handed to the cashier a forged paper, of which the following is a copy.

“*Holton, Mar. 31, 1853.*

Sirs,

Pleas to pay the Bearis, Mrs. *Smart*, the sum of Eaigth Hundred and 50 4*£* ten shillings for me.

James Ramsey.

This paper was folded in the shape of a letter, and was addressed outside, “Mrs. *Smart*.” The cashier asked the prisoner if her name was *Smart*? She said, “Yes.” He then asked her if she had seen Mr. *Ramsey* write the order? She said, “No.” He handed it to her.

The cashier did not pay the money mentioned in the paper. Upon cross-examination, he said, that if he had seen Mr. *Ramsey* write it, or had known that it was his writing, he should have treated it as an order, and have paid the money, although it was not addressed to Messrs. *Alexander*. Mr. *Ramsey* proved

The prisoner was indicted for forging an order for the payment of money. The document was in the following form: “*Holton, Mar. 31, 1853.* Sirs, Pleas to pay the bearis Mrs. *Smart* the sum of Eaigth Hundred and 50 4*£* ten shillings for me. *James Ramsey.*” Held, that though this document was not addressed to any one, it might be shewn by evidence to be an order for the payment of money, within the 11 Geo. 4 & 1 Wm. 4, c. 66, s. 3, and for whom it was intended.

1853. that the paper was a forgery, and the prisoner having been convicted, I saved the question, whether the paper above set forth was, under the circumstances, an order for the payment of money within the statute.

SNELLING'S Case.

JOHN JERVIS.

On the 12th of *November*, 1853, this case was argued before JERVIS C.J., POLLOCK C.B., PARKE B., COLERIDGE J., and WILLIAMS J.

Dasent, for the prisoner. It is submitted that this is not an order for the payment of money within the 11 Geo. 4 & 1 Wm. 4, c. 66. Under the 3rd section of this Act it is made an offence amongst other things *to forge or alter, or offer, utter, or dispose of or put off, knowing the same to be forged or altered, any undertaking, warrant, or order for the payment of money, &c.*

There are three things necessary to constitute a valid order for the payment of money within this statute, *viz.*: 1st, there must be a drawer; 2ndly, a payee; and 3rdly, there must be a person to whom the order is addressed. The third ingredient is wanting in the present case.

POLLOCK C. B.—Suppose a case of this kind. I call at my banker's and tell him I shall send a person for a certain sum of money. Afterwards that person calls with an order, signed by me, for that sum, but it is not addressed to any one, would you contend that such an instrument is not a valid order for the payment of money within the statute?

PARKE B.—There is the case of *Rex v. Ross Carney* (1 Mo. C. C. 351), where it is held that on an indictment under the 10th section of this act, a request for the delivery of goods need not be addressed to any one, and that parol evidence may be given to shew to whom it was intended to be addressed. The request was simply, “gentlemen.”

POLLOCK C. B.—*Carney's case* seems quite decisive. 1853.

Dasent. Parol evidence may be given where there has been a habit of paying such instruments as in *Rex v. Rogers*, 9 C. & P. 41. SNELLING'S Case.

POLLOCK C. B.—An accurate banker might perhaps require that the order should be addressed to him, but though that should not be done, would not the payment be good?

Dasent. It is submitted that the banker would have no authority to pay an order not addressed to them. Such an imperfect order would not be a good voucher in the hands of the bankers. In *Rex v. Clinch* (2 East, P. C. 938), an indictment stating an order to deliver goods purporting to be signed by one who was alleged to be the servant of the owner, but not stating that such servant had authority to make such order was held bad.

JERVIS C. J.—There is the case of *Rex v. Cullen* (1 Ry. & M. C. C. 300), in which it appears that a request need not be addressed to any particular person. Now, suppose the document to have been genuine, and payment to have been made, would it not have been a good voucher?

Dasent. No. *Ramsey* may have had accounts with two bankers. If it were a good voucher for one, it might be so for the other.

JERVIS C. J.—The case referred to of *Rex v. Clinch*, upon which the prisoner's Counsel appears to rely, is somewhat different from what has been stated. If that case be closely looked into, it will be found that the instrument must either be an order, or be capable of being explained by evidence to be an order. The objection was, that it did not sufficiently appear by the indictment to be an order. The question was one of pleading, not of evidence. We are now upon evidence, therefore let us apply the test, whether the

1853. instrument appears by the evidence to be a valid
 SNELLING'S order.

Dasent. There is the case of *Rex v. Ravenscroft*,
 1 R. & R. 160.

PARKE B.—There the Judges held that the order in question was not an order for payment of money, there being no special averments in the indictment that it was intended for an order, or that *Masterman & Co.* were bankers. It is an authority for supplying by evidence the omission on which you now rely.

Dasent. It is submitted, that there is no evidence in this case to shew that any one at all was addressed.

Worlledge, for the Crown. The present is a valid order within the statute. The test applied by JERVIS C. J., in *Dawson's case* (2 Den. 75), is the true one. The learned Judge there says, “I think if this had been a genuine document, and payment had been made on its production, proof of those facts would have been a good ground to an action.”

WILLIAMS J.—There the document was addressed. Suppose this to have been a genuine document, but presented to a wrong person, would the payment by him discharge him?

Worlledge. Perhaps in the particular case suggested it might not; but if *Ramsey* sent an order without an address, telling his servant to go to a particular person for payment, and supposing that person to cash it, it is submitted he would be discharged by such payment. *Carney's case* is directly in point. *Clinch's case* is not applicable, as it turned simply on a question of pleading. In *Vivian's case* (1 C. & K. 719), the document was addressed to the banker's clerk instead of the banker, and COLERIDGE J. held that it might be shewn by evidence that the banker was intended. In *Pulbrook's case* (9 C. & P. 37), it was held that an address was not necessary within the 10th section of

the act of Parliament, and in *Rex v. Hawkes* (2 Moo. C. C. 60), it was held that though there was no person named as drawer the defendant might be indicted for uttering a forged acceptance on a bill of exchange. The absence of any address was amply supplied by the evidence which was authorized by the cases of *Carney* and *Pulbrook* cited above. *Dasent*, in reply, contended that the order was so informal that the bankers might have refused to obey it, and if so, it was not a valid order within the statute.

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Case.

JERVIS C. J.—If the cases cited were conflicting, which I think they are not, the Court would be bound by the more recent decisions. The cases with one exception appear identical. The difference between a request and an order is this, the former purports to be made without authority, the latter with authority to command. It is conceded that had the paper in question been addressed to “Messrs. *Alexander*,” it would have been an order, and the question is, does the omission of those words prevent it being an order? I think those words unnecessary. The statute refers to orders, receipts and requests, all of which are in writing, and governed by the same rules. To write a name at the foot of a bill may be a forgery of a receipt but not necessarily of itself, unless it be shewn to be a receipt. A request not addressed to any one may be a request, but the conduct of the party may shew that he intended it to be a request. *Rex v. Cullen* is an authority to shew that a request need not be directed to any one. The cases of *Rex v. Carney* and *Rex v. Pulbrook* are not dissimilar from *Rex v. Cullen*. Let us see if the case of *Rex v. Clinch* differs from these authorities. I think not. There it was necessary to shew on the face of the indictment that the order was made on some one, otherwise it was not a valid order. By virtue of a recent act such an averment is no

1853. longer necessary, since the instrument may be described in the same manner as in an indictment for larceny of it. In *Rex v. Clinch* the averment was insufficient. Here there is evidence to supply the want of the apt averment. Suppose, for instance, the word "Sirs" upon these cheques always meant "Messrs. Alexander," would not that order do? It would when the meaning of "Sirs" was explained by evidence. I think the cases if narrowly examined do not conflict, and that to make a good order for the payment of money, the instrument must be directed or be explained by evidence to be the same as if directed to some one.

POLLOCK C. B.—If the cases were conflicting, I agree with the Chief Justice that the Court would be bound by the more recent decision, but I am of opinion that they do not conflict. I am of opinion that this is a valid order. Supposing the facts to have been true, and the instruments to have been genuine, would it not have been such an order as if paid would have relieved the bankers from any further demand for the money so paid? I am of opinion it would. The facts supply the want of a formal direction to a banker. We are bound to suppose that *Ramsey* told her to go to the bank; that she was told they would not pay her without an order, that she replied, *Ramsey* says that an order is not necessary, and that she came back the next day with this document from *Ramsey*. It would then be a good order. It is addressed "Sirs," and she delivers it to the persons for whom she says it was intended. I clearly am of opinion that the document in question is an order for the payment of money within the statute.

PARKE B.—I entirely concur with the Lord Chief Justice and the Lord Chief Baron. The instrument upon the face of it purports to be an order for the

payment of money. I am not clear that an order for the payment of money requires the name of the drawee to appear on it. In some cases it must be shewn to be addressed to some person. In all cases it must appear that there was an intent to defraud. The form of the instrument here is "please to pay." And I am not satisfied that there is not enough on the face of it to make it an order without shewing who was meant to pay it. I agree in the distinction which has been pointed out between this case and that of *Rex v. Clinch*.

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SNELLING's Case.

COLERIDGE J.—I am of opinion that this is an instrument which may be explained by evidence to be an order for the payment of money. I would not be understood as differing from my Brother PARKE on the subject of this being, on the face of it, an order for the payment of money, but only to express the opinion that the Court is not called upon to determine what elements are necessary to perfect an order for the payment of money. It might have been otherwise had this point now arisen for the first time. I also concur with my learned Brothers in thinking that the cases cited are not conflicting.

WILLIAMS J.—I have entertained great doubts in the course of the argument, whether we ought not to hold the case of *Rex v. Clinch* to be in point, and I still am inclined to think, having the misfortune to differ from the rest of the Court, that it is in point. *Rex v. Carney* and *Rex v. Pulbrook* decide that a request need not specify who is the party requested to pay. I thought at first that this case might be distinguished from those of requests, but I think it cannot. The principle of the cases on requests must govern the present case, and I am therefore of opinion that the conviction is right.

Conviction affirmed.

1853.

REGINA v. REASON.

The prisoner, a letter carrier from C. to T. on the day in question, brought the sealed bag containing the letters from C., and delivered it safely at the post office of T. to the postmaster, whose duty it was to sort the letters in time to make up the bags for the mails. The prisoner's duty was complete when he delivered the bags to the postmaster of T., but after the performance of his duty, he was requested by the postmaster of T. to assist in the sorting, which he consented to do, and whilst so engaged contrived to steal one of the letters containing a shilling. The prisoner was indicted for stealing a post letter containing money.

At the last assizes holden at *Cardiff*, *William Reason* was indicted for stealing a post letter containing money. The indictment contained also a count for simple larceny. The jury found him Guilty.

From the month of *November* 1852, until and upon the day of committing the offence, *William Reason* was employed under the Post Office as a carrier of letters from *Cwm Avon* to *Taybach*, in *Glamorganshire*. The letters were delivered in a sealed bag, which it was his duty to deliver as he received it to the postmaster at *Taybach*, and on such delivery to the *Taybach* postmaster, the performance of the duty of his employment was complete.

On the morning of the day on which the offence was committed, he brought from *Cwm Avon* the sealed bag containing letters, and delivered it safely at the *Taybach* post office to the *Taybach* postmaster, whose duty it was to sort the letters in time, to make up the bags for the mail passing through that town.

The prisoner *Reason*, on being requested by the *Taybach* postmaster to assist in the sorting, consented to do so, and whilst he was proceeding in the assort-
ment, contrived to steal one of the letters. That letter contained a shilling.

Gifford, the prisoner's Counsel, submitted that upon these facts the offence did not fall within the 26th section of the act, as the sorting formed no part of the prisoner's employment under the Post Office;

Held, that the prisoner was employed under the post office in sorting the letters within the meaning of 7 Wm. 4 & 1 Vict. c. 36, s. 26.

but that the assistance he had consented to render in sorting the letters, was merely gratuitous, and rendered to the postmaster for his personal accommodation only.

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Case.

Evans, on the part of the prosecution, contended that the facts brought the offence within the 26th section as interpreted by the 47th.

Having doubts upon the subject, I postponed the judgment until the next assizes, in order that the prisoner might have the benefit of the question thus raised, being considered and decided by her Majesty's Judges, and of their directions upon which of the two counts the verdict should stand.

T. J. PLATT.

November 1853.

This case was argued on the 12th *November*, 1853, before JERVIS C. J., POLLOCK C. B., PARKE B., COLE-RIDGE J., and WILLIAMS J.

Hardinge Giffard for the prisoner. The prisoner was not employed under the Post Office within the meaning of the 7th Wm. 4 & 1 Vict. c. 36, s. 26. The 26th section of the statute is as follows: "That every person employed under the Post Office who shall steal, or shall for any purpose whatever embezzle, secrete, or destroy a post letter, shall in England and Ireland be guilty of a felony, &c.: and if any such post letter so stolen, or embezzled, secreted, or destroyed, shall contain therein any chattel or money whatsoever, or any valuable security, every such offender shall be transported beyond the seas for life." The 47th section of the statute, which is the interpretation clause, enacts, amongst other things, as follows: "And the *expressions*, 'persons employed by, or under the Post Office,' shall include every

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Case.

person employed in any business of the Post Office, according to the interpretation given to the officer of the Post Office." The expression, "officer of the Post Office," is declared to include "the Postmaster General, and every deputy postmaster, agent, officer, clerk, letter carrier, guard, post-boy, rider, or any other person employed in any business of the Post Office, whether employed by the Postmaster General, or by any person under him, or on behalf of the Post Office."

It is contended, that the employment must be by some person having authority to employ some one. A mere casual and capricious employment will not suffice. The case of *Reg. v. Glass* (2 C. & K. 395) seems to be a case in point. There it was held by the fifteen Judges, that the taking of the notes by the prisoner was not a larceny, the notes not being in his possession in the course of his duty as a Post Office servant. The words referred to cannot have so general a signification as is contended for by the Crown.

POLLOCK C. B.—The generality of the definition may have been purposely intended to avoid all difficulties.

PARKE B.—It is very reasonable, that a person employed as the prisoner, and who steals a letter, should be severely punished.

COLERIDGE J.—In the case of *Reg. v. Glass*, it was not the business of the postmaster to get money orders.

POLLOCK C. B.—Sorting is the business of the post officer.

COLERIDGE J.—A postmaster in the country is often assisted by his wife. I have never understood it to be doubted that the wife, in such a case, is employed under the Post Office.

Giffard. There is the case of *Reg. v. Simpson* (4 Cox C. C. 275). If it can be said that the prisoner was employed under the Post Office, so might a seaman on board of one of the mail packets.

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Case.

PARKE B.—That would be no more than being in a house where letter bags were kept.

POLLOCK C. B.—I am glad that my Brother PLATT reserved this point as it is important, and it is necessary that it should be settled. We entertain no manner of doubt that the prisoner falls within the term of "employed under the Post Office." He comes within the exact terms. He was employed by the postmaster, who was employed by the Postmaster General.

Conviction affirmed.

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 t New & Co, 3 Park 552, 23
 295 GLAMORGAN MIDSUMMER QUARTER 5 Aug 39
 SESSIONS, 1853. Leigh & G.

THE QUEEN, on the prosecution of EVAN HARRIS,
against WILLIAM VODDEN, for Larceny.

1853

Verdict, Not Guilty ; amended to Guilty.

OWEN HUGHES, one of the jurors, delivered a verdict of Not Guilty, which was entered by the clerk of

On the trial
of an indict-
ment for
larceny, one
of the jurors

delivered a verdict of *Not Guilty*, which was entered in the minutes of the clerk of the peace, according to the usual practice. The prisoner was discharged out of the dock. Immediately he was discharged, and before the jury had left the box, others of the jury interfered, and said the verdict was *Guilty*. The prisoner was brought back to the dock, and the jury was again asked what their verdict was. They all answered *Guilty*, and the person who delivered the first verdict said, that he had said *Guilty*. The Chairman, thereupon, ordered a verdict of *Guilty* to be recorded.

Held, that the verdict of *Guilty* was rightly recorded.

1853. the peace on his minutes, from which the record is made up, and also by the Chairman who heard the words "Not Guilty" in his note book, prisoner being thereon discharged out of the dock, others of the jury interfering, said the verdict was "Guilty." Then the prisoner being brought back into the dock, the Chairman asked the jury what the verdict was. All the twelve jurors answered that it was Guilty, and that they had been unanimous. The Chairman then asked *Owen Hughes* why he had said "Not Guilty," to which he replied that he (*Owen Hughes*) had said "Guilty."

The Chairman then directed a verdict of Guilty to be recorded, and sentenced the prisoner to be imprisoned for two calendar months, and to be kept to hard labour.

The prisoner has procured bail, and is now out of custody.

This case was argued on the 12th *November*, 1853, before JERVIS C. J., POLLOCK C. B., PARKE B., COLERIDGE J., and WILLIAMS J.

Hardinge Giffard, for the prisoner, submitted that the verdict of Not Guilty was entered on the record of the Court, and a considerable interval elapsing before the verdict of Guilty was entered, that the alteration was contrary to law.

PARKE B.—A wrong verdict was taken in the first instance, and corrected on the spot.

Giffard. There was a considerable interval between the first and the second entry, so much so that the prisoner was discharged from the dock in the meantime. The verdict was recorded in the book of the clerk of the peace, and could not afterwards be altered.

COLERIDGE J.—Those entries must be made correctly.

POLLOCK C. B.—It is much to be lamented that there should be a departure from the old forms. It was usual formerly, after the delivery of the verdict, for the clerk to address the jury as follows: “Hearken to your verdict as the Court has recorded it! You say that the prisoner is Not Guilty? And so say you all.” When this form was observed, there was an opportunity of correcting any mistake.

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VODDEN'S
Case.

PARKE B.—This shews the very great danger of departing from old forms.

Giffard. Some interval of time should be fixed within which it is proper to make a correction.

POLLOCK C. B.—We do not think the Court is called upon to say at what interval of time a correction should be made. All we do is to say that in the present case the interval was not too long. Nothing has been done but what daily takes place in the ordinary transactions of life; namely, a mistake is corrected within a reasonable time, and on the very spot on which it was made.

We are all of opinion that what took place was right.

Conviction affirmed.

Court of Session for CIV

1853.

REGINA v. GABRIEL SANS GARRETT.

The defendant was indicted in England for a misdemeanor in attempting to obtain moneys from L. & Co., by false pretences. The defendant, had a circular letter of credit, marked No. 41, from D. S. & Co., of New York, for 210*l.*, with authority to draw on L. & Co. in London, in favour of any of the lists of correspondents of the bank in different parts of the world, for all or such sums as he might require of the 210*l.* The circular letters of credit of D. S. & Co., were each numbered with distinctive numbers, and it was the practice of the correspondent on whom the draft was drawn, after giving cash on such draft, to endorse the amount on the circular letter; and when the whole sum was advanced, the last person making such advance retained the circular letter of credit. The defendant having procured from D. S. & Co., of New York, a circular letter of credit for 210*l.*, No. 41, came to England, and drew drafts in favour of the named correspondents there in different sums, in the whole less than 210*l.*, retaining the circular letter, the sums so advanced being endorsed on the letter. He then went to St. Petersburg, and there exhibited the letter of credit to W. & Co. of that place, a firm mentioned in the list of correspondents, the letter having first been altered by him, by the addition of the figure 5 to 210, so converting it into a letter of credit for 5,210*l.* He obtained from that house several sums, and finally a sum of 1,200*l.* and another of 2,500*l.* on drafts for those amounts on L. & Co. W. & Co. forwarded these drafts to their house in London, who presented the draft for 1,200*l.* on L. & Co., and required payment of it. L. & Co. having been advised of the draft, No. 41, by D. S. & Co. as a draft for 210*l.* only, discovered the fraud and refused to pay it. The defendant being afterwards found in England was taken into custody, and indicted as before stated. The jury found the prisoner guilty, and in reply to a question put by the learned Baron, as to whether, although the defendant's immediate object was to cheat W. & Co. at St. Petersburg, by means of the forged letter of credit, he did not also mean that they or their correspondents, or the indorsees from them should present the draft and obtain payment of it from L. & Co., and the jury further found that he did.

Held, that if L. & Co. had paid one of the drafts the defendant could not in law have been found guilty of the statutory misdemeanor; and, consequently, that he could not be found guilty of attempting to commit the Common Law misdemeanor.

That the said Messrs. *Duncan, Sherman & Co.* had been and were accustomed to give to such persons as should apply to them for the same authority to demand from the said Sir *Peter Laurie* and others, as such bankers and correspondents as aforesaid, payment of divers sums of money for account and on the behalf of the said Messrs. *Duncan, Sherman & Co.*

That the said Sir *Peter Laurie* and others, as such bankers and correspondents as aforesaid, had been and were accustomed to pay to the persons so authorized as aforesaid, the sums of money demanded by them in pursuance of such authority, for the account and on the behalf of the said Messrs. *Duncan, Sherman & Co.*

That the prisoner *Gabriel Sans Garrett*, well knowing the premises and being an evil-disposed person, and devising and designing &c. on the 3rd *March*, 1853, at the parish &c. within the jurisdiction, &c. did demand payment for the account and on the behalf of the said Messrs. *Duncan, Sherman & Co.* from the said Sir *Peter Laurie* and others, as such bankers and correspondents of the said Messrs. *Duncan, Sherman & Co.* as aforesaid of the sum of 1,200*l.* and did then and there unlawfully and falsely pretend to the said Sir *Peter Laurie* and others that he the said *Gabriel Sans Garrett* had been and was then duly authorized by the said Messrs. *Duncan, Sherman & Co.* for their account and on their behalf, the payment of the said sum of 1,200*l.* from the said Sir *Peter Laurie* and others, as such bankers and correspondents of the said Messrs. *Duncan, Sherman & Co.* as aforesaid, with intent, &c., unlawfully, &c., to obtain from the said Sir *Peter Laurie* and others divers moneys to a large amount, to wit 1,200*l.* of the moneys and property of the said Sir *Peter Laurie* and others, to cheat and defraud them of the same.

Whereas the said *Gabriel Sans Garrett*, had not

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1853. at any time been, and was not then or at any time duly or at all authorized by the said Messrs. *Duncan, Sherman & Co.*, to demand for their account or on their behalf or otherwise, from the said Sir *Peter Laurie* and others, as such bankers and correspondents of the said Messrs. *Duncan, Sherman & Co.*, as aforesaid or otherwise, the payment of the said sum of 1,200*l.* or any part thereof. Which said false pretence the prisoner at the time, &c., knew to be false. And so the jury say that the said *Gabriel Sans Garrett*, by means of the said false pretences, on the day, &c., at the parish, &c., did attempt and endeavour unlawfully, &c., to obtain from the said Sir *Peter Laurie* and others, such money as aforesaid, then being their property, and to cheat and defraud them thereof.

The 8th count stated the pretence to have been made to *Thomas Druitt*, then being clerk to Sir *Peter Laurie* and others, and was in other respects the same as the 7th.

The 15th count charged that on the same day and year, he did unlawfully, &c., pretend to Sir *Peter Laurie* and others, that he had been and then was duly authorized by *Alexander Duncan* and others, then carrying on business in *New York*, in the United States of *America*, under the style or firm of Messrs. *Duncan, Sherman & Co.*, to demand payment for their account, and on their behalf of the sum of 1,200*l.* from the said Sir *Peter Laurie* and others, with intent, &c., unlawfully to obtain from the said Sir *Peter Laurie* and others, 1,200*l.* of the moneys and property of the said Sir *Peter Laurie* and others, and to cheat and defraud them of the same; whereas the said prisoner had not at any time been, and was not then or at any time duly or at all authorized by the said *Alexander Duncan* and others, to demand for their account or

on their behalf or otherwise, from the said Sir *Peter Laurie* and others, the payment of the said sum of 1,200*l.* or any part thereof, which said false pretence at the time, &c., the prisoner knew to be false. And so the jury say that the prisoner by means of the said last mentioned false pretence, on the day and year, &c., at the parish, &c., and within the jurisdiction, &c., did attempt and endeavour unlawfully, &c., to obtain from the said Sir *Peter Laurie* and others, such moneys as aforesaid, then being their property, and to cheat and defraud them thereof.

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The 16th count is similar in form and substance to the 9th count, but alleges that the pretence was made to one *Thomas Druitt*, then being clerk to Sir *Peter Laurie* and others.

The prisoner was convicted on these counts only, and it is unnecessary to state the others.

On the trial it appeared that Messrs. *Duncan, Sherman & Co.*, of *New York*, the correspondents of the *Union Bank* in *London*, in which Sir *Peter Laurie* and others were partners, were in the habit of issuing circular letters of credit for certain sums, with a list of correspondents in different parts of the world, authorizing the person to whom letters of credit were given to draw in favour of one of those correspondents, for such part as he might require of the stipulated sum for which the letters of credit were given. The *Union Bank* correspondent, on giving cash on such draft, was to endorse the amount on the circular, and when the whole was advanced the last person making an advance retained the circular. The circular letters of credit were each numbered with distinctive numbers. The prisoner having procured such a circular from Messrs *Duncan, Sherman & Co.*, at *New York*, for 210*l.*, No. 41, came to *England* and there drew drafts in favour of the named correspondents there to the

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1853. amount in different sums of less than 210*l.*, and consequently retained the circular letter of credit, those sums being endorsed on it. He then went to *St. Petersburg*, and there exhibited the letter of credit to *Wilson & Co.*, of that place, one of the firms mentioned in the list of correspondents, it having been then altered by him by the addition of the figure 5 to 210*l.* and converted into a letter of credit for 5,210*l.*, No. 41. He obtained from that house several sums, and finally a sum of 1,200*l.* and another of 2,500*l.* on drafts for those amounts on the *Union Bank* drawn by the prisoner in favour of their firm in *London*, all of which were endorsed on the back of the letter of credit.

Wilson & Co. on receiving those drafts forwarded them to their house in *London*, and they duly presented the draft for 1,200*l.* on the *Union Bank* and required payment of it.

It becomes unnecessary to state the circumstances as to any other draft, the proof of one case being sufficient to raise the point made for the defendant. The *Union Bank* having been advised of the draft, No. 41, by *Sherman & Co.* as a draft for 210*l.* only, and so discovering the fraud, refused to pay the 1,200*l.*, and the defendant being afterwards found in *England* was taken in custody, and then the indictment in question was preferred against him.

Robinson, the prisoner's Counsel, contended,

1st. That the prisoner had committed no offence in *London*.

2ndly. That he had not committed the offence charged in the indictment.

I thought a person, though personally abroad, might commit a crime in *England*, and be afterwards punished here: as, for instance, if he by a third person sent poisoned food to one in *England*, meaning to kill him, he would be guilty of murder if death ensued,

although he could not be amenable to justice till he was personally within the jurisdiction, and I thought it was a question for the jury whether, although the prisoner's immediate object was to cheat *Wilson & Co.*, at *St. Petersburg*, by means of the forged letter of credit, he did not also mean so that they or their correspondents or the indorsees from them should present the draft which was unauthorized by the true letter of credit, and obtain payment of it from the *Union Bank* in *London* by presenting it as a true one, and I left the question to the jury whether he did so intend, and the jury found that he did.

The prisoner's Counsel also contended that if he did so mean, and could be considered as making *Wilson & Co.*, of *London*, his innocent agents to present the unauthorized cheque, that he did not mean to obtain the amount of the cheque from the *Union Bank* in the sense of that word in the indictment which it was contended meant an obtaining for himself, but that he only meant to enable *Wilson & Co.* to obtain it for themselves. *Rex v. Wavell* (1 Moody C. C.) was cited.

I thought it right not to pass sentence on the prisoner, but to respite judgment until the opinion of the Judges could be taken upon both these points.

I accordingly request their opinion.

J. PARKE.

This case was argued on 19th November, 1853, *coram* JERVIS C. J., POLLOCK C. B., PARKE B., COLE-RIDGE J., WILLIAMS J., and CROMPTON J.; and re-argued November 26th, 1853, *coram* Lord CAMPBELL C. J., PARKE B., COLERIDGE J., MAULE J., PLATT B., WILLIAMS J., TALFOURD J., and CROMPTON J.

Byles Serjt. (with him *Robinson*).

1st. The defendant did not intend or attempt to

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1853. defend the *Union* Bank at all in contemplation of law.

GARRETT'S Case. 2nd. When the draft was presented by *Wilson & Co.* he had committed no offence in *England*, and would not if it had been paid.

3rd. He did not intend to obtain any "chattel, money, or valuable security" within the meaning of 7 & 8 Geo. 4, c. 29, s. 53.

Upon the last point we contend that even if money had been parted from by the *Union* Bank, yet the defendant would not have obtained any "chattel, money, or valuable security." *Wilson & Co.* would indeed have obtained the money but for their own benefit, and they would not have been bound to account to the defendant. He would only have obtained credit in account with the *Union* Bank by overdrawing his account. This is, however, scarcely an open question, as it seems to have been decided in *Rex v. Wavell*, 1 Moo. C. C. 224. There the defendant obtained credit in account from his own bankers by lodging with them a fictitious bill of exchange, and it is held that although the bankers paid money for him in consequence, by honouring his cheques drawn in favour of other persons, yet it was not a case within the statute. Lord TENTERDEN, saying "he only obtains credit in account, somebody else receives the money." That case cannot be distinguished from the present. Suppose a man utters a 5*l.* note, knowing it to be forged. As between himself and the person to whom he utters, he might, supposing the misdemeanor did not merge in the felony, be guilty of obtaining money by false pretences, but if the note subsequently passed through the hands of fifty other persons it cannot be said that every time it changed hands there would be an obtaining money by false pretences.

Lord CAMPBELL C. J.—After he once had the money he would have no further interest in the matter.

Byles Serjt. So here it was a matter of indifference to the defendant whether the draft were paid or not. If a man draws a cheque upon a banker with whom he has no account, or to an amount beyond his account, that is a fraudulent pretence to whom it is presented, but not to the banker. *Rex v. Lara*, 6 T. R. 565.

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Huddleston (with him *Dearsly*), in support of the conviction, was then heard upon this point. It is not necessary to constitute an offence within the act of Parliament, that there should be a getting of money from the party himself, or his use, but the inducing another to part with his money under such circumstances as amount to cheating is sufficient. The words of the statute are, "obtain from any other person." Suppose a man intending to ruin another induces him, by a false pretence, to part with a large sum of money to a third party, would it not be obtaining money under false pretences?

MAULE J.—You say it is sufficient if a man, by a false pretence, induces another to spend his money?

Huddleston. There must be the intent to cheat or defraud.

MAULE J.—The word "obtain" means the same as the word "get," in its sense of "acquire."

COLERIDGE J.—You must consider the word with reference to its use in the statute, which draws a distinction between larceny and false pretences.

Huddleston. The statute does not contemplate the benefit of the party defrauding, but the injury to the party defrauded; *Reg. v. Jones* (1 Den. C. C. 188). Here there was an acquiring to the use of the defendant. It is not necessary, that the party from whom the money is obtained should actually hand it over to the person making the false pretence. This case is distinguishable from that put on the other side of the

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5*l.* forged note. The jury have found, that defendant meant that *Wilson & Co.* in *St. Petersburg*, or their correspondents, or indorsers, should present the draft, and obtain payment of it from the *Union Bank*. Thus *Wilson & Co.* are the agents pointed out and mentioned by the defendant himself, as the persons to whom the *Union Bank*, with whom he falsely asserts he has credit, should pay the money. They are the persons to receive it.

Lord CAMPBELL C. J.—What were they to do with the money when received?

Huddleston. They were to apply it to his use. An actual reduction of the money into the possession of the defendant cannot be necessary. *Wavell's case* is distinguishable, the decision being, that no specific sum was obtained, but credit in account.

COLERIDGE J.—How is the false pretence made out? He had the circular letter of credit in his possession. The cheque imported only that he had funds.

PARKE B.—The cheque itself represented that it was authorized by the letter of credit. It referred to it by the figures 41. But that point is not reserved.

Huddleston. If the bankers had paid the money, they might have sued defendant for money paid to his use. Their payment to *Wilson & Co.* would have been a good payment to him.

Byles Serjt. replied.

The Court then gave judgment, with argument upon the first two points made, as follows:

Lord CAMPBELL C. J.—I am of opinion that the conviction cannot be supported. The question is, whether supposing the *Union Bank* honoured the defendant's draft upon them, he could then have been indicted under this act of Parliament, for obtaining

any chattel, money or valuable security. I am clearly of opinion he could not. I do not proceed upon the ground that the offence was committed beyond the jurisdiction of the Court, for if a man employ a conscious or unconscious agent in this country, he may be amenable to the laws of *England*, although at the time he was living beyond the jurisdiction; but I think this would not have been an obtaining of money within the meaning of the act of Parliament, which contemplates the money being obtained according to the wish and for the advantage, or at all events to gain some object of the party who makes the false pretence. Here it was not to gain any object, and it was not according to his wish. He would derive no benefit from the cheque being honoured. He had obtained his full object in *St. Petersburg*, and had the money in his pocket, and it would have been for the advantage of the defendant if the draft had been burnt or sent to the bottom of the sea. The statute was intended to meet a failure of justice arising from the distinction between larceny and fraud. But with regard to larceny, we must see whether there is not some advantage to be gained, not necessarily a pecuniary advantage, but some wish gratified by the taking and conversion, otherwise it would not be larceny. Then we are pressed by the finding of the jury, but they merely meant to say that the defendant foresaw that the cheque would be presented to the *Union Bank*, and not that he wished it. In one sense it may be said, that he meant it according to the maxim, that every body must be presumed to mean, or intend the natural consequences of his act, but it is impossible to say that it was the real wish of the party when he drew the cheque, that it should be presented and honoured. A gross fraud has been committed, but not an obtaining money under false pretences within the statute.

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1853. PARKE B.—The word “obtain,” as used in the GARRETT's
Case. statute, seems to mean not so much a defrauding or depriving another of his property, as the obtaining some benefit to the party making the false pretence. In *Wavell's case*, there was a false pretence, with the view of obtaining a specific sum of money, and it appears to have been decided upon the ground that no chattel or valuable security was obtained by means of that false pretence. The difficulty I have had, supposing it to be the law, that this is not a case in which the party may be considered as having obtained some benefit, but I do not feel so strongly upon this point as to compel me to differ in opinion from my Lord. It is not shewn that he would have obtained the money if the draft had been honoured and the money paid. I think therefore this conviction fails.

COLERIDGE J.—Upon the question of construction, the point to be considered is, whether if the money had been obtained, this would be a case within the 53rd section of the Act. It is quite clear it cannot be said the defendant actually obtained the money himself, nor do I think he obtained it by means of any agent. The obtaining must be either by the party's desire or intention, or for his benefit, but there is no foundation for saying that the money would have been obtained in this case, either in one of these ways or the other. The defendant did not desire it, he could not have intended it, for he knew perfectly well that the payment was out of the question. The finding of the jury only means, that the defendant contemplated it as a probable thing, that *Wilson & Co.* would present the draft.

MAULE J.—I think all that the defendant did with respect to the matter in hand was done at *St. Petersburg* and no part of it in *London*. That which was done in *London* by *Wilson & Co.* is sought to be brought home to the defendant as an act of his, when

it is clear he would desire that that very act should not be done. It is quite clear the jury never intended to say (if they did it is quite contrary to the facts of the case) that he requested, desired or ordered or made *Wilson & Co.* his agents to present the draft, but they must have meant that he considered that would take place which would naturally take place.

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If a man utters a forged note with intent to defraud the Bank of *England*, if the Bank pay the note, they would be defrauded and he must be responsible for his act. The question there depends upon the manner or mode in which the Bank parts with the money and not upon who gets it. By the circumstances under which the Bank is cheated out of their money they are defrauded. But whether money is obtained or not by false pretences does not depend upon the mode in which it is obtained, but upon the person and manner by whom and in which it is received. Here the money would have been obtained by some persons whom he foresaw would present the draft. They did not mean to apply the money to his purposes but their own. I am therefore of opinion that the prisoner is not criminally responsible for what took place in *London*. He did not order it to be done. It was no act of his. And for the prisoner's own act in *St. Petersburg* he is not responsible in *London*.

PLATT B.—The matter was complete as far as the defendant was concerned when the parties at *St. Petersburg* were deluded into giving him money upon the cheque. It cannot be said that a party who presents a cheque for his own benefit is the agent of another who receives no benefit whatever.

The other members of the Court concurred.

Conviction quashed.

1853.

REGINA v. BAILEY.

The prisoner was indicted under the 14 & 15 Vict. c. 19, s. 1, with having in his possession, without lawful excuse, certain implements of house-breaking, &c. The jury found the prisoner guilty. Held, that it was not necessary to allege in an indictment under this section, the words, "with intent to commit a felony."

THOMAS BAILEY was tried at the *Middlesex Sessions*, on *Monday, 31st October, 1853*, before *Henry Witham, Esq.*, upon an indictment under the "Act for the better Prevention of Offences," 14 & 15 Vict. c. 19, s. 1.

The indictment charged that *Thomas Bailey* on the fifth day of *October* in the year of our Lord one thousand and eight hundred and fifty-three, about the hour of twelve in the night of the same day at the parish of *Saint James Westminster* in the county of *Middlesex*, was found by night as aforesaid then and there having in his possession without lawful excuse certain implements of housebreaking, to wit, one chisel and one jemmy against the form, &c. The jury found the prisoner guilty of possession without lawful excuse, and they also found that there was no evidence of an intent to commit a felony. It was contended on behalf of the prisoner by his Counsel, in his address to the jury, that there was no evidence of an intent to commit a felony, and that such evidence was requisite. After verdict it was further contended that the omission of the words "with intent to commit a felony" was bad in arrest of judgment.

Judgment was postponed, and the said *Thomas Bailey* was committed to the House of Correction at *Clerkenwell* to abide the decision of the Court of Appeal.

The opinion of the Court of Appeal is requested as to whether the omission of the words "with intent to

commit a felony" is bad in arrest of judgment, and whether it was necessary to prove an intent to commit a felony.

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Case.

HENRY WITHAM.

This was argued on the 26th *November*, 1853, before Lord CAMPBELL C. J., PARKE B., COLERIDGE J., MAULE J., PLATT B., WILLIAMS J., TALFOURD J., and CROMPTON J.

Metcalfe, who had defended the prisoner at the Sessions, was not instructed.

Huddleston, for the Crown, read the different sections of the act of Parliament.

The Court unanimously confirmed the conviction.

Conviction affirmed.

REGINA v. LUCKHURST.

1853.

THE prisoner was tried before me at the last *Maidstone* Assizes, on a charge of having committed an unnatural crime with a mare.

The first witness for the prosecution was *John Taylor*, the material part of whose evidence was as follows :

An inducement to confess, in the shape of a threat, was held out to the prisoner, who was suspected of an offence, by a person hav-

ing no authority, and without the nature of the charge being stated, but in the presence and hearing of a person who had authority. Subsequently, the nature of the charge was stated by the same person in the same presence and hearing, and thereupon a confession was made.

Held, that the confession was not admissible.

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I live at *Canterbury*. On the 2nd of *June* I had a stall in a stable at the *George and Dragon*, and kept a mare there. There was a gate in front of the stall in which she was. People could look through the bars of it, and could get over into the stall. I had locked it on the 2nd of *June*. In the evening I found a man in the stall. The prisoner was the man. It was then after eight o'clock. I asked him what business he had there? He said, some one had locked him in. I said, I had the key in my pocket. I asked him what was the matter with the mare? He said, he had not hurt it. I said, your trousers are undone. Then I let him out. Then I went and told Mr. *Willard*, the landlord of the stable. After he left, I looked at the mare. She was bleeding, and kept straining. There was wet dung on the corn-chest, and footmarks on it. *Willard* went to the stable, and then to *Crow's* with me. We there saw the prisoner. *Willard* asked him, what business he had in the stable? I observed some hairs on the prisoner's trousers, all round the front. I picked them off, and shewed them to him. The outer door of the stable was not locked.

Richard Willard. I keep the *George and Dragon*. I went with *Taylor*, on the 2nd of *June*, to the stable—observed the condition of the mare—very restless. I went with *Taylor* to *Crow's*, and saw the prisoner. I called him out, and said I wished to speak to him. I said, I wished to know what business he had in *Taylor's* stable, as it was my fault leaving the outside door open, and he must have gone through my premises to get to *Taylor's*. He said, "You know." I said, I don't know, and have come on purpose to know, and will know before I leave; and if you don't tell me, I will give you in charge to the police till you do tell me. He said again, "You know." I said,

I don't know, but according to what I could see of the mare, it is the best of my belief that you had connexion with her. He said, "I had. For God's sake say nothing about it!" He offered to treat me, or give me any thing to say nothing about it. Then I left him at *Crow's* bar. *Taylor* was close by at the time when I had this conversation with him.

Cross-examined.—I called you a dirty beast, and left you directly. You and *Taylor* then went to the stable.

The prisoner was not defended by Counsel, and no objection was made by him to the evidence, but the Counsel for the prosecution called my attention to the nature of it before it was given. I thought it best to receive the evidence and reserve the question of its admissibility.

The prisoner was found guilty, and judgment of death recorded.

I have now to request the opinion of this Court whether the evidence of *Willard* was admissible or not.

C. CRESSWELL.

This case was considered on November 26th, 1853, by Lord CAMPBELL C. J., PARKE B., COLERIDGE J., MAULE J., PLATT B., WILLIAMS J., TALFOURD J. and CROMPTON J.

PARKE B. We have considered this case, which was not argued by Counsel. The question is, whether the admission made to the witness *Willard* was receivable in evidence. The prosecutor, *John Taylor*, states that he had a stable in which he kept a mare, and that he found the prisoner in the stable.

The witness, *Richard Willard*. I went with *Taylor* on the 2nd of June to the stable. I observed the condition of the mare—very restless. I went with *Taylor*

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to *Crow's* and saw the prisoner. I called him out and said I wished to speak to him. I said I wished to know what business he had in *Taylor's* stable, as it was my fault leaving the outside door open, and he must have gone through my premises to get to *Taylor's*. He said, "You know." I said I don't know, and have come on purpose to know, and will know before I leave, and if you don't tell me I will give you in charge to the police till you do tell me.

This is a threat undoubtedly, though up to this time the charge had not been mentioned. This witness goes on to say that the prisoner again said, "You know," and that he (the witness) said, I don't know, but according to what I could see of the mare, it is the best of my belief that you had connexion with her. The prisoner said, "I have; for God's sake say nothing about it!"

We are of opinion that the evidence of this witness was not admissible. There was a threat. I allow it may be objected at the time of the threat there was no statement of the charge, yet before the confession he was told, in the presence of *Taylor*, that the charge was for having had connexion with *Taylor's* mare, which is just the same as if the threat had been made by *Taylor* himself, and he being the owner of the mare was a person in such authority that a threat by him would exclude a subsequent confession. The conviction therefore must be reversed.

Conviction quashed.

REGINA v. SLEEMAN.

1853.

THIS case was tried before me at the last Summer Assizes for *Exeter* (1853), and the prisoner was convicted.

The prisoner was the servant of *John Sandercock*, and was indicted for setting fire to a farm building belonging to her master on the 2nd of *June*, 1853. She was taken into custody by *George Slee*, a policeman, on the 15th *June*. She was about to go away from him but he prevented her, saying she was his prisoner upon the charge of this arson. She then desired to change her dress. He said she might do so but that she must remain in custody, and he gave her into the charge of a Mrs. *Allen*. Mrs. *Allen* was a married daughter of her master's, but did not live in her father's house, and had no control over the prisoner by reason of any relation of master and servant. Mrs. *Allen* went with her into a lenny where her clothes were, but both Mrs. *Allen* and the prisoner considered that the latter was in custody. The following is the evidence of Mrs. *Allen*, so far as is necessary to raise the question :—

The prisoner was given into my charge by *George Slee* the policeman. I took her into the lenny to change her clothes. The first thing I said to her was,

the prisoner being in custody, the former said to the prisoner, "I am very sorry for you; you ought to have known better. Tell me the truth, whether you did or no." The prisoner said, "I am innocent." Mrs. *A.* replied, "Don't run your soul into more sin, but tell the truth." The prisoner then made a full confession.

Held, that there was neither an authority to make any inducement nor any inducement or threat, and that the evidence was admissible.

The prisoner, a maid servant, was indicted for setting fire to a farm building of her master's. She was taken into custody by a policeman. She endeavoured to get away, but was told she was a prisoner on the charge of arson. She desired to change her dress and was permitted to do so, having first been given into the charge of Mrs. *A.*, a married daughter of the master, but having no control over the prisoner by reason of any relationship of master and servant. Whilst alone with Mrs. *A.*,

1853. Jane I am very sorry for you, you ought to have known better, tell me the truth whether you did it or no.
SLEEMAN'S Case. She said, "I am innocent." I said, Don't run your soul into more sin, but tell the truth. She then began to cry, and sat down, and said that she took a crop of furze from the mow frame, and she only meant to burn the machine house. She then went on to state how she set the place on fire, and made a full confession of her guilt.

I postponed the judgment as I desired the opinion of the Court of Criminal Appeal whether the above confession was legally admissible in evidence, and if not legally admissible, I request that the Court may make an order for the discharge of the prisoner.

SAMUEL MARTIN.

August 3, 1853.

This case was considered on *November 26th, 1853*, by Lord CAMPBELL C. J., PARKE B., COLERIDGE J., MAULE J., PLATT B., WILLIAMS J., TALFOURD J., and CROMPTON J.

PARKE B. (having read the case).—We are of opinion that in this case there was no threat or inducement, and no sufficient authority on the part of Mrs. *Allen* to exclude a statement made in consequence of any inducement to confess held out by her. The conviction therefore will be affirmed.

Conviction affirmed.

REGINA *v.* HENRY MARSHALL STONE.

1853.

At the *York* Summer Assizes, 1853, the prisoner was found guilty of perjury in an affidavit used in the Court of Admiralty, in a suit for salvage. The affidavit was sworn before a Master Extraordinary in Chancery.

And upon objection that this officer had no authority to take an affidavit to be used in the Court of Admiralty, evidence was adduced that the practice of the Court of Admiralty had been to receive affidavits so sworn, and *In re Hogg* (1 Rob. Adm. Rep. 174), and 6 & 7 Vict. c. 82, were cited.

The prisoner was admitted to bail, and the question for the decision of the Court is, whether the conviction is valid.

W. ERLE.

This case was argued on the 19th November, 1853, *coram* POLLOCK C. B., PARKE B., COLERIDGE J., WILLIAMS J., and CROMPTON J.

Cross, for the prisoner. The question for the consideration of the Court is, whether a Master Extraordinary of the Court of Chancery has authority to administer an oath and take an affidavit to be used in a suit in the Court of Admiralty: it is submitted he has no such power. Masters Extraordinary were first introduced in the time of Sir *Christopher Hatton*, and they are appointed by order of the Chancellor, and not by commission. At first their jurisdiction did

A Master Extraordinary in the Court of Chancery has no authority to administer an oath in a suit in the Court of Admiralty.

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not exceed three miles from *London*, which was afterwards extended to twenty miles. The practice of the Court of Admiralty in receiving such affidavits cannot in itself confer an authority to administer an oath.

The Court here called upon

Perronet Thompson (*Digby Seymour* with him), for the Crown. The Court of Admiralty has always received such affidavits. And it is submitted that the practice of the Court has, in fact, constituted the Masters Extraordinary officers of that Court for the purpose of taking affidavits. It is said in 1 *W. Rob. Adm. Rep.* 174, that "affidavits sworn before Masters Extraordinary must contain in the jurat the insertion of the place where they were sworn." And this was necessary, as an affidavit sworn beyond the prescribed limits was a mere nullity. In that case it was not even questioned that within limits a Master Extraordinary had authority to take affidavits to be used in a suit in the Admiralty Courts.

PARKE B.—Surely the practice of the Court of Admiralty cannot confer on the Masters Extraordinary authority to administer an oath.

Perronet Thompson. The Court of Chancery, from the earliest period appears to have had an Admiralty jurisdiction, and the Masters in Chancery appear to have been coeval with the Court. In *Com. Dig. Chan.* b. 5, we find the following : "Cancellario associetur Clerici honesti, &c. Regi Jurati qui in Legibus et consuetudinibus Anglicanis noticiam habent pleniorum quorum officium sit querelas, &c. audire et examinare et debitum remedium exhibere per brevia Regis." The learned Counsel cited *Fleta*, lib. 2, c. 13 ; *Co. Lit.* 260, 2 *Inst.* 407 ; Edwards on Admiralty Juris. 8. 31 ; Hen. 6. Rot. Parl. vol. 5, p. 268 ; 25 Hen. 8, c. 19 ; 8 Eliz. c. 5 ; *Blad v. Bamfield*, 21st Nov. 26 Car. 2 ; *Denew v. Stock*, Finch.

Chan. Rep. 437; *The Sylvan Bell*, 2 Ad. Rep. 155.

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In the 16th section of the 14 & 15 Vict. c. 99, every Court, Judge, justice, &c. having authority to hear, &c., is thereby empowered to administer an oath.

POLLOCK C. B.—This conviction is wrong. The Masters Extraordinary in Chancery have no authority, by virtue of their commission, to administer an oath in matters in the Court of Admiralty. No practice of that Court can confer such authority. It is probable that the Court of Admiralty may have acted upon such affidavits, because though perjury could not be assigned on them, a person making such an affidavit with a view to its being received by the Court, knowing at the same time that it was false, would be guilty of a misdemeanor, and so liable to be punished.

PARKE B.—I am of the same opinion. The authority of a Master in Chancery is coeval with that Court, and the Lord Chancellor is not restricted in the appointment of them. That, however, does not prove that they may take affidavits on oath administered by themselves, to be afterwards used in a suit in the Admiralty Court. The authorities relied upon by the prosecution only go to shew, that in proceedings in Chancery, if that Court has an Admiralty jurisdiction, the Masters may administer an oath, but that proves nothing when the cause is in the Admiralty Court. I concur with the Chief Baron, in saying that any person making such an affidavit, knowing it to be false, would be guilty of a misdemeanor.

The rest of the Court concurred.

Conviction quashed.

1853.

WILLIAM DUGDALE v. THE QUEEN.

Upon a writ of error on a conviction of misdemeanour, the 8 & 9 Vict. c. 68, is not complied with by a recognizance the condition of which is that the defendant in case of affirmance of the judgment shall surrender himself personally to be dealt with as the Court of Exchequer Chamber may order; and the Court will order fresh process to issue for the apprehension and recommitment of the plaintiff in error in a criminal case where he has been discharged from prison, without a proper recognizance having been duly filed and certified.

WRIT of Error in the Queen's Bench. The plaintiff in error was tried before Mr. Serjt. Adams, at the Westminster Sessions, on the 24th of September, 1851, upon indictment charging him with unlawfully preserving and keeping certain lewd and obscene prints, and also with obtaining and procuring the same, with the intent and for the purpose of uttering and selling the same. He was found guilty, and sentenced to be imprisoned for two years, whereupon a writ of error was sued out. The errors assigned were, that the indictment shewed no offence upon the face thereof known to the law, the 1st count merely charging the defendant with procuring indecent pictures for the purpose of afterwards unlawfully publishing and selling them, which was not an indictable offence; the 2nd count, with keeping the same pictures in his possession for the same purpose; the 3rd, 4th and 6th counts, with procuring obscene libels for a libellous purpose; and the 5th and 7th counts charging the defendant with keeping in his possession the same obscene libels for the same purpose; and the plaintiff in error prayed that the judgment for these errors and other errors appearing in the record and proceedings might be reversed, annulled, &c.; joinder in error.

This case was argued in January, A.D. 1853, before Lord CAMPBELL C. J., COLERIDGE J., WIGHTMAN J., and CROMPTON J., when the Court held that the counts in the indictment, charging that the defendant

did unlawfully obtain and procure obscene prints with the intent and for the purpose of unlawfully uttering and selling the same, and thereby corrupting the morals of the liege subjects of the Queen were good, and charged a misdemeanor punishable at common law, and that the counts in the indictment, charging the defendant with preserving and keeping in his possession obscene prints with a like intent, and for a similar purpose were insufficient in law, and therefore there was judgment for the Crown; when Lord CAMPBELL C. J., ordered the defendant's bail then to produce the defendant in Court, not for sentence, but in order that the Court might commit him to prison. Neither the defendant, nor his bail, appeared in Court when called.

Clarkson, for the Crown, prayed that the recognizances of the defendant and his bail might be estreated, and the Court ordered the recognizances to be estreated accordingly (a).

In *Trinity Term*, 1853, *Clarkson* obtained a rule calling upon the plaintiff in error to shew cause why he should not be apprehended and recommitted to the custody of the keeper of the House of Correction at *Clerkenwell*, in the county of *Middlesex*, in execution of the judgment. The affidavit upon which the rule was moved in the Queen's Bench, set forth the conviction at the sessions, and the sentence thereon; that on a writ of error that judgment was affirmed on several counts in the indictment, and that the said *William Dugdale* was thereupon recommitted to prison; that on the 7th of *April* another writ of error was issued, at the instance of the said *William Dugdale*, to the Court of Exchequer Chamber, and he was

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1853. discharged from prison on the 9th of *April*, upon putting in bail to prosecute the writ ; that no notice was given to the prosecutor ; that the recognizance of bail had not been filed at the Crown Office ; that no certificate had been made out pursuant to the 8 & 9 Vict. c. 68, s. 2, and 9 & 10 Vict. c. 24, s. 4, and that no recognizance whatever was filed till 13th *April*.

Metcalfe, on a subsequent day for the plaintiff in error, shewed cause against the rule. It is contended for the Crown, that the discharge of the plaintiff was wrong, as no recognizance had been filed at the Crown Office, and no certificate issued by the Master as the statute required, and that the justification of bail was insufficient.

Our affidavit states, that the bail were duly sworn and examined, &c., and an order duly made for the discharge, and that the recognizance was filed within four days afterwards, when the Master made out his certificate of the filing.

WIGHTMAN J.—In case of the affirmance of the judgment, the recognizance is, that he shall surrender himself personally, to be dealt with as the Court of Exchequer Chamber may order, and not, as the statute requires, that he shall be rendered to prison, according to the said judgment.

Clarkson, contra, was not called upon.

Lord CAMPBELL C. J.—The recognizance is insufficient, and the discharge from prison was not only contrary to the letter, but to the spirit of the act of Parliament.

The other Judges concurred. (a)

Rule absolute.

(a) The recognizance was not set conditions of recognizance, see now out in the affidavit, but it being 16 & 17 Vict. c. 32. filed the Court inspected it. As to

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REGINA v. REED.

1854.

At the General Quarter Sessions of the peace, for the county of *Kent*, holden at *Maidstone*, on the 4th day of *January*, 1853, before *Aretas Akers*, *Edward Burton* and *James Espinasse*, justices appointed in and for the county of *Kent*, *Abraham Reed* was tried upon an indictment for feloniously stealing two cwt. of coals, the property of *William Newton*, his master, on the 6th day of *December* 1852; and one *James Peerless*, was charged, in the same indictment, with receiving the coals knowing them to have been stolen, but was acquitted. The evidence of the prosecutor, *William Newton*, was as follows: "I am a grocer and miller at *Cowden*, and sell coals by retail. The prisoner *Reed* entered my service last year, about three weeks before the 6th of *December*. On that day I gave him directions to go to a customer to take some flour, and thence to the station, at *Edenbridge*, for ten cwt. of coals. I deal with the *Medway* Company, who have a wharf there, *Holman* being wharfinger. I told *Reed* to bring the coals to my house. *Reed* went about 9 A.M., and ought to have come back between 3 and 4 P.M.; but as he had not come back I went in search of him, at half past six, and found him at *Peerless'*. The cart was standing in the road opposite to the house, and the two prisoners were taking coals from the cart in a truck basket. It was dark. I asked *Reed* what business he had there. He said to deliver half a hundred weight for which he had received an order from *Peerless*. *Reed* had never before told me of such an order, and had no authority from me to sell coals. Later that evening

R. was sent by his master to the railway station for 10 cwt. of coals, which being supplied, were placed in sacks, and put into the master's cart. The prisoner was directed by his master to bring the coals to his house. On his way home, without authority, he disposed of a quantity of the coals to a third person.

Held, that the coals, when placed in the master's cart, were in the master's possession, and that *R.* was properly convicted of larceny.

1854. I went and asked *Peerless* what coals he had received from my cart. He said half a hundred weight. I then asked him how they were carried from the cart. He said in a sack. I weighed the coals when brought home, and found the quantity so brought at half a hundred weight and four pounds short. I went to *Peerless'* next day and found some coals apparently from half to three quarters." Upon his cross-examination he stated as follows, I believe *Peerless* had sometimes had coals from me. When I came up they were shutting the tail of the cart, but some coals were in a truck basket at their feet. *Reed* said at once he had received an order from *Peerless*. It was two hours later when I asked *Peerless* and when he said he had ordered them. *Reed* said he had carried two cwt. in, but that was two hours after.

On his re-examination he said, I think *Peerless* had some coals from me about a fortnight before the sixth.

James Holman, another witness for the prosecution, said, I am a wharfinger to the *Medway* Company at the *Edenbridge* station, and *Newton* deals there for coals. *Reed* came there on the 6th of *December* and asked for half a ton for *Newton*, and I supplied him. I entered them at the time to *Newton*, and now produce the book with the entry.

James Handley, another witness for the prosecution. I am superintendent of the *Sevenoaks* division. On the 17th *December* I went to *Peerless* and asked him how much coals he had received from *Reed*. He said he had ordered half a hundred weight three weeks before. *Reed*, when I asked him afterwards, said three days before. *Reed* said he had received two glasses of wine from *Peerless*.

On his cross-examination he said this was about 4 P.M. 7th *December*.

Newton was then re-examined, and said: *Reed* came to me on the morning of the 7th. I told him two cwt. and three quarters were missing. He then said one sack had been left at the wharf by mistake. I therefore charged him with only three quarters.

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Holman, upon re-examination, said *Reed* left a sack behind him, but it was an empty one.

This being the case for the prosecution, the Counsel for the prisoner submitted that there was no case to go to the jury on the charge of larceny, inasmuch as the possession of the coals left at *Peerless'* had never been in *Newton* the master.

The Counsel for the prosecution contended that the coals were constructively in the possession of *Newton*, and that the offence was properly charged as larceny; but that, under the provisions of the act of the 14 & 15 Vict. c. 100, s. 13, it was immaterial whether the offence were larceny or embezzlement, as the jury might find a verdict for either larceny or embezzlement.

The Counsel for the prisoner thereupon proposed that it should be left to the jury as a charge of embezzlement; but this was objected to.

The Court were of opinion that there was a constructive possession in the master, and left the case to the jury as one of larceny. The jury found the prisoner Guilty. The Counsel for the prisoner then applied to the Court to submit the case for the opinion of the Judges. The Court respite the judgment, and discharged the prisoner upon entering into recognizances; and the Chairman reserved the point as to whether or not the prisoner was rightfully convicted of larceny upon the evidence.

This case was argued on the 23rd April 1853, and was re-argued on the 19th of November 1853 before

1854. **Lord CAMPBELL** C. J., **JERVIS** C. J., **POLLOCK** C. B.,
PARKE B., **COLERIDGE** J., **MAULE** J., **ERLE** J., **PLATT**
B., **WILLIAMS** J. and **TALFOURD** J. (*a*).

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(*a*) The argument in this case was fully reported at page 168 of these Reports, under the impression that judgment would have been given before that part was published; but the learned Judges having differed in opinion the judgment was postponed from time to time, from the 23rd April, 1853, to January 21st, 1854. Under these circumstances, and as many fresh cases were cited, the Editor has thought it right to re-report the case.

Ribton, for the prisoner. It is submitted that the offence of which the prisoner was guilty, if any, was embezzlement and not larceny. In every case of larceny there must be a taking from the possession of the owner, which possession may be actual or constructive. Formerly an actual possession was required, and this led to the 21 Hen. 8, c. 7. Constructive possession is of two kinds.

1st. When property is given to the servant by the master or into his charge or custody.

2ndly. Where the servant receives goods from a third person, and the servant determines his possession by some act which vests the possession in the master.

The constructive possession in this case is of the second kind, or else there is no possession in the master. There is a difference between actual possession and the right to possession. The property cannot be said to be in the master until the subject-matter has arrived at its ultimate destination. *Waite's case*, 1 Leach, 28; 2 East, P. C. 570. *Rex v. Bazaley*, 2 Leach,

835; 2 East, P. C. 571. *Rex v. Ball*, 2 Leach, 841. *Rex v. Walsh*, 4 Taunt. 276; R. & R. 215; 2 East, P. C. 177.

Lord CAMPBELL C. J.—In the report in 4 *Taunt*, *Heath* J. referring to *Spear's case* says, "That case went upon the ground that the corn was in the prosecutor's barge," which was the same thing as if it had been in his granary.

Ribton. The report in *East* differs. *Rex v. Sullens*, 1 Moo. C. C. 129. *Rex v. Masters*, 3 Cox, C. C. 178.

Lord CAMPBELL C. J.—How do you define a place of final deposit?

Ribton. That would depend upon the particular case. In this instance, the house of the master would be the final place of deposit.

Lord CAMPBELL C. J.—Suppose the coals to have been put in a moveable house, would not the coals be in the master's possession?

Ribton. They would then be in the place of final deposit.

Lord CAMPBELL C. J.—Suppose the moveable house to be pushed on half a mile?

PARKE B.—The master lives in the house. The cart is but the means of transit to some ulterior place of destination.

Ribton. The stable door was considered a place of final deposit, in the case of *R. v. Hayward*, 1 C. & R. 508.

Lord CAMPBELL C. J.—*Rex v. Spears* is on all fours with this case.

PARKE B.—In *Rex v. Spears* it is not certain, looking at the reports in *East* and *Leach*, whether the judgment did not turn on the

On the 21st *January* A.D. 1854, the following written judgment was delivered by

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Lord CAMPBELL C. J.—There lies before me a judgment which I had prepared for myself at a time when there was reason to suppose that there might be one, if not more, dissenting Judge. I have reason to believe now that there will not be any dissent; but still this judgment must be considered only as the reasons I give for my opinion, because I have no authority to say that my Brothers concur in that opinion, and the reasons for it. I have written my judgment, and my learned Brothers will say how far they concur or dissent. I am of opinion that the prisoner has been properly convicted of larceny. There can be no doubt that, in such a case, the goods must have been in the actual or constructive possession of the master, and that if the master had not otherwise the possession of them than by the bare receipt of his servants, upon the delivery of another for the master's use, although as against

fact that the master had bought the whole cargo.

Rose, for the prosecution. This amounted to an offence at common law. There was a trespass, as the coals were asked for in the master's name, charged to the master in the bill, put into the master's sacks, and then put into the master's cart. And so the master had constructive possession before the servant had actual exclusive possession. *Com. Dig.*, *Trespass* B. 4. This case cannot be distinguished from *Rex v. Spears*. There may be a constructive possession in the master notwithstanding the manual possession of the servant. *Robinson's case*, 2 East, P. C. 565.

Lord CAMPBELL C. J.—I do not see how *Spear's case* can be distin-

guishable from the present, unless we imagine some fact not stated in the case.

Rose. Rex v. Bull was a case of money which constitutes a matter of account and no trespass would lie. *Higgs v. Halliday*, Cro Eliz. 746.

Lord CAMPBELL C. J.—*Spear's case* is to be taken from the 2nd edition of *Leach*, as appears from *Heath J. in 4 Taunt. Rex v. Harding*, R. & R. 125, was also cited.

Ribton, in reply, referred to *Rex v. Watts*, 2 Den. C. C. 14. There the defendant divested himself of the possession. In this case the coals had not reached their final place of deposit.

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third persons this is in law a receipt of the goods by the master, yet, in respect of the servant himself, this will not support a charge of larceny, because as to him, there was no tortious taking in the first instance, and consequently no trespass. Therefore, if there had been here a quantity of coals delivered to the prisoner for the prosecutor, and the prisoner having remained in the personal possession of them, as by carrying them on his back in a bag, without anything having been done to determine his original exclusive possession, had converted them *animo furandi*, he would have been guilty of embezzlement and not of larceny. But if the servant has done anything which determines his original exclusive possession of the goods, so that the master thereby comes constructively into possession, and the servant afterwards converts them *animo furandi*, he is guilty of larceny, and not merely of a breach of trust at common law, or of embezzlement under the statute. On this supposition he subsequently takes the goods tortiously in converting them, and commits a trespass. We have, therefore, to consider whether the exclusive possession of the coals continued with the prisoner down to the time of conversion. I am of opinion that this exclusive possession was determined when the coals were deposited in the prosecutor's cart, in the same manner as if they had been deposited in the prosecutor's cellar of which the prisoner had the charge. The prosecutor was undoubtedly in possession of the cart at the time when the coals were deposited in it, and if the prisoner had carried off the cart *animo furandi*, he would have been guilty of larceny; *Robinson's case*, 2 East, P. C. 565. There seems considerable difficulty in contending that if the master was in possession of the cart, he was not in possession of the coals which it contained, the coals being his pro-

perty, and deposited there by his orders for his use. Mr. *Ribton* argued that the goods received by a servant for his master remain in the exclusive possession of the servant till they have reached their ultimate destination ; but he was unable, notwithstanding his learning and ingenuity, to give a definition of "ultimate destination," when so used. He admitted that the master's constructive possession would begin before the coals were deposited in the cellar, when the cart containing the coals had stopped at his door, and even when it had entered his gate. But I consider the point of time to be regarded, is that when the coals were deposited in the cart. Thenceforth the prisoner had only the custody or charge of the coals, as a butler has of his master's plate, or a groom of his master's horse. To this conclusion, with the most sincere deference for any of my learned Brothers who may at any time have taken a different view, I should have come upon principle, and I think that *Spears's case* is an express authority to support it. The following is an exact copy of the statement of that case, signed by *Buller J.*, in pages 182, 183, of the second volume of the *Black Book*, containing the decisions of the Judges in Crown Cases, and deposited with the Chief Justice of the Queen's Bench for the time being :—“ *John Spears* was convicted before me, at *Kingston*, for stealing forty bushels of oats of *James Brówne & Co.*, in a barge on the *Thames*. *Browne & Co.* sent the prisoner with their barge to *Wilson*, a corn meter, for as much oats as the barge would carry, and which were to be brought in loose bulk. The prisoner received from *Wilson* 220 quarters in loose bulk, and five quarters in sacks, the prisoner ordering that quantity to be put in sacks. The quantity in sacks was afterwards embezzled by the prisoner, and the question reserved for the opinion of the Judges is,

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whether this was felony, the oats never having been in the possession of the prosecutor, or whether it was not like the case of a servant receiving charge, or bringing a thing to his master, but never delivering it.

“F. BULLER.”

Vide Dy. 5, and *1st Show.* 52. 25th April 1798. “Conviction proper.” Now that is an exact copy from the *Black Book*, what follows, of course, is new. In that case the question was, whether the corn, while in the prosecutor’s barge in which it was to be brought by the prisoner to the prosecutor’s granary, was to be considered in the possession of the prosecutor, and the Judges unanimously held that from the time of it having been put into the barge it was in the prosecutor’s possession, although the prisoner had the custody or charge of it. That case has been met at the Bar by a suggestion that the whole cargo of corn of which the quantity put on board this barge was a part, was or might have been purchased by the prosecutor, so that he might have had a title and constructive possession, before the delivery to the prisoner. But the very statement of the case in the *Black Book* and the authorities there referred to, shew that the Judges turned attention to the question whether the exclusive possession of the servant had not been determined before conversion, and during the argument of *R. v. Walsh* (4 Taunt. 276), we have the *ratio decidendi* in *Spear’s case* explicitly stated by one of the Judges who concurred in the decision—*Heath J.* “That case went upon the ground that the corn was in the prosecutor’s barge, which was the same thing as if it had been in his granary.” Read “cart” for “barge,” “coals” for “corn,” and “cellar” for “granary,” and the cases are for this purpose precisely the same. There is no conflicting authority, for in all the cases relied upon

by Mr. *Ribton*, the exclusive personal possession of the prisoner had continued down to the wrongful conversion. It is said there is great subtlety in giving such an effect to the deposit of the coals in the prosecutor's cart, but the objection rests upon a subtlety wholly unconnected with the moral guilt of the prisoner: for as to that it must be quite immaterial whether the property in the coals had or had not vested in the prosecutor prior to the time when they were delivered to the prisoner. We are to determine whether this would have been a case of larceny at common law before there was any statute against embezzlement, and I cannot think that there would have been any reproach to the administration of justice in holding that the subtlety arising from the prosecutor having had no property in the subject of the larceny before its delivery to the prisoner who stole it, was sufficiently answered by the subtlety that when the prisoner had once so parted with the personal possession of it that a constructive possession by the prosecutor began, the servant who subsequently stole it should be liable to be punished, as if there had been a prior property and possession in the prosecutor, and that the servant should be adjudged liable to be punished for a crime instead of being allowed to say that he had only committed a breach of trust, for which he might be sued in a civil action. In approaching the confines of different offences created by common law or by statute, nice distinctions must arise and must be dealt with as in the present case. It is satisfactory to think that the ends of justice are effectually gained by affirming the conviction, for the only objection to it is founded upon an argument that he ought to have been convicted of another offence of the same character, for which he would have been liable to the same punishment.

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JERVIS C. J.—I concur in the judgment which has been delivered. As my Brother *Parke* differed from the rest of the Court, the case was ordered to be re-argued. I am of my original opinion. It is admitted that the cart was in the possession of the prisoner's master; therefore the delivery of the coals into the cart vested the possession of them in the prisoner's master.

PARKE B.—I certainly had differed from the view of this case which has been taken by Lord *Campbell*, at a time when it was uncertain what the case of *Spears* actually was, and I felt myself entitled to treat this case as *res nova*. The book in which the opinions of the Judges are written, and which is always in the custody of the Lord Chief Justice, was mislaid, and the case of *Spears* was differently reported in the two editions of *Leach*, and also in *East's Crown Law*, and the case could not for some time be found. It has been found; I have satisfied myself; and I entertain no doubt upon it. I should have delivered my reasons at very great length, but it is unnecessary now to do so. The case has been discovered, and I find the precise point decided. Were it *res nova*, I should pronounce an opinion that the prisoner's offence is not larceny.

Conviction affirmed.

REGINA *v.* GREENHALGH.

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At the General Quarter Sessions for the borough of *Bolton*, holden on the 19th of *December* 1853, *David Greehalgh* and *Edward Clapham* were tried before me on an indictment charging that they, by false pretences, did unlawfully obtain from one *Benjamin Beswick* an order upon *William Ashton Entwistle* for the payment of 2*l.* 10*s.*, and also did unlawfully obtain from one *Ellen Entwistle* the sum of 2*l.* 10*s.*, the moneys of the said *William Ashton Entwistle* with intent to defraud.

There were two other counts for obtaining by false pretences from *Ellen Entwistle* the sum of 2*l.* 10*s.*, the moneys of *William Ashton Entwistle*, with intent to defraud.

It appeared on the trial that there is a burial society in *Bolton* called the *Bolton Union Burial Society*, the rules of which have neither been certified nor enrolled. That the prisoner *Greenhalgh* was the secretary, and the prisoner *Clapham* collector of such society, both being members of the same and interested in its funds. That *Benjamin Beswick* was the president and *William Ashton Entwistle* the treasurer of the society. That a weekly subscription of one halfpenny for twenty weeks would entitle the representatives of a deceased member to the sum of 2*l.* 10*s.* That in the case of the death of any member of the society it was the duty of the two prisoners as secretary and collector to view the body together, to report the death to the president, and to apply to him for an order upon the treasurer for the amount to which the representatives of such deceased member

G., secretary to a burial society was indicted for falsely pretending that a death had occurred, and so obtaining from the president an order on the treasurer in the following form:—

“*Bolton United Burial Society, No. 23, Bolton, Sept. 1st, 1853, Mr. A. Entwistle, Treasurer.*

Please to pay the bearer 2*l.* 10*s.*, *Greenhalgh*, and charge the same to the above society.

Robert Lord, Benjamin Beswick, President.”

Held, that this was a valuable security under the 7 & 8 Geo. 4, c. 29, s. 53, as explained by the 5th section of the same statute.

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were entitled, and to receive the same upon such order for the benefit of such representatives. That the treasurer would pay such orders out of the moneys of the society in his hands. That on the 1st of *September* the two prisoners came together to *Benjamin Beswick*, the president of the said society. He was at his work in a cellar below, and *Greenhalgh* called out “*Ben*, there's another death; thou must come up and give an order.” He came up and found the two prisoners in the house, and said “Who is dead?” *Greenhalgh* replied, “*Robert Lord's* child.” *Beswick* asked the name of the child. *Greenhalgh* said “*Robert Lord*.” He asked them whether they had seen the corpse, and they both said the child was dead. He then asked where the parties lived. *Clapham* said in *Green Street*. That *Beswick*, believing their statements (which, in fact, were wholly and entirely false, no member of the name of *Lord* being dead at that time), gave and signed the order he was so asked for, and which was as follows (that is to say):

“*Bolton United Burial Society*, No. 23.

“*Bolton*, *September* 1st, 1853.—Mr. *W. A. Entwistle*, treasurer.—Please to pay the bearer *2l. 10s.*, *Greenhalgh*, and charge the same to the above society. *Robert Lord*.

“*Benjamin Beswick*, President.”

That *Greenhalgh* took the said order, and the prisoners went away together, and afterwards, on the same day, went together to *Entwistle's*, the treasurer's, and saw *Ellen Entwistle* his daughter, and *Greenhalgh* asked if her father was in, and she said no. He then said there is a death, and we want *2l. 10s.*, and gave her the said order so obtained from the president. She told them they must wait until her father came in. They said they could not wait, and *Clapham* said that *David* (that is *Greenhalgh*)

was going off by the train. She at last gave them 2*l.* 10*s.* on account of her father as such treasurer, and she did so from what they said and they giving her the said order. She gave the money to *Greenhalgh*, and she saw *Greenhalgh* afterwards give twenty shillings of that money to *Clapham*.

The learned Counsel for the prisoner objected that these facts did not bring the case within the statute.

I declined to stop it, and left the case to the Jury, who found both the prisoners guilty.

I sentenced them to be severally imprisoned for eighteen months, with hard labour.

The question for the opinion of the Court is, whether the prisoners, on the above stated facts, were properly convicted or not.

R. B. Armstrong,
Recorder of Bolton.

This case was argued on the 21st day of *January* 1854, before JERVIS C. J., WIGHTMAN J., CRESSWELL J., PLATT B., and WILLIAMS J.

No Counsel appeared for the prisoner.

Cross, for the Crown. This conviction is right. One objection was, that the society was not certified and enrolled.

JERVIS C. J.—There is nothing in that.

WIGHTMAN J.—The objection to the first count appears to have been, that the order was not a valuable security within the statute.

Cross. Yes; and there was evidence to support that count.

JERVIS C. J.—We will not trouble you as to the other counts. The conviction is clearly right on the first count. The only question is, whether the order was within the 53d section of the 7 & 8 Geo. 4, c. 29. That section enacts “That if any person shall by

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any false pretence obtain from any other person any chattel, money, or valuable security, with intent to cheat or defraud any person of the same, every such offender shall be guilty, &c." Now, the 5th section of the same statute gives the rule of interpretation, which is, that "each of the several documents hereinbefore enumerated shall throughout this act be deemed for every purpose to be included under and denoted by the words valuable security." One of those documents is "Order or other security whatsoever, for money or for the payment of money." The case therefore is very clear.

The other learned Judges concurred.

Conviction affirmed.

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REGINA v. BEAUMONT.

The prosecutor had contracted with the Great Northern Railway Company for finding and providing them with necessary horses and

At the general session of oyer and terminer and gaol delivery, holden for the jurisdiction of the Central Criminal Court, on the 28th day of November 1853, *Edward Beaumont* was tried and convicted before me upon an indictment for embezzlement, whereby it was charged in the usual manner, that he,

carmen for the purpose of conveying and delivering to the customers of the company the coals of the company in their own waggons; and that he or his carmen should, day by day, duly account for and deliver to the company's coal manager all moneys received in payment for coals so delivered. The delivery notes, as well as receipted invoices, of the coals were handed to the carmen of the prosecutor, and the former were taken to his office, but the invoices receipted by the company were left with the customers on payment of the amount. The prisoner was the servant of the prosecutor, employed as his carman in the delivery of coals, pursuant to the contract, and it was his duty to pay over direct to the clerks of the company such moneys as he might receive for coals. The prisoner delivered coals to one of the company's customers, and brought the delivery order to the office to be entered; he received for the coals the sum of 5*l.* 10*s.*, leaving the receipted invoice with the customer, which sum he converted to his own use. He was indicted and convicted of embezzling the moneys of the prosecutor, who had contracted with the company.

Held, that there was such privity as to make the prisoner the agent of the company in receiving the money, and that such money was not received for or on the account of the prosecutor, but for or on the account of the railway company.

being servant to *Edward Wiggins*, by virtue of his employment as such servant, received the sum of 5*l.* 10*s.* on account of his said master, and feloniously embezzled and stole that sum of money, and alleging that money to be the money of the prosecutor.

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Edward Wiggins, the prosecutor, had become a contractor with the *Great Northern Railway Company*, for finding and providing them with necessary horses and carmen, for the purpose of drawing, conveying, and delivering to the customers of the company the coals of the company in their own waggons, and had moreover contracted with the said company that he or his carmen should, day by day, duly account for and deliver to the said company's coal manager all moneys received from such customers in payment for coals so delivered. The delivery notes, as well as receipted invoices, of the coals were handed to the carmen of *Wiggins*, and the former were taken to his office to be entered in his books, but the invoices which were already receipted by the company were to be left with the customer on payment of the amount.

The prisoner was the servant of *Edward Wiggins*, and was employed by him as his carman in the delivery of coals pursuant to the said contract, and it was his duty to pay over direct to the clerks of the company any money he might receive for any such coals. It did not appear that such moneys so received by him and paid over to the company ever formed items of account between *Edward Wiggins* and the company. On the day mentioned in the indictment the prisoner had, as the servant of Mr. *Wiggins*, delivered coals of the company to one of their customers. He also brought the delivery order to *Wiggins'* office, which was entered in his books and received in payment the price of the coals, viz., the sum of 5*l.* 10*s.* mentioned

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in the indictment, and left the receipted invoice with the customer. This sum he never handed over or accounted to the company or their clerks, but converted the same to his own use, thereby rendering his master liable to pay that amount to the company under the said contract. This was the embezzlement upon which the prosecutor relied.

It was contended for the prisoner,

First. That the money had not been received on account of the prosecutor Mr. *Wiggins*, and that under such circumstances the crime of embezzlement within the meaning of the indictment and the 7 & 8 *Geo. 4*, c. 29, had not been completed.

Secondly. That the ownership of the money as stated in the indictment was not proved as laid.

As to the first point I directed the jury that as the prisoner was the servant of Mr. *Wiggins* and received the money in the course of his employment as such servant, they might under the above circumstances find that he received it on account of his master in the sense used in and required to be proved by the indictment.

On the second point I directed the jury that even if it were necessary to prove the money obtained to be the property of the prosecutor, (of which I had some doubt), yet if they found that it was received by the prisoner on the prosecutor's account it would be the property of the master in the sense of the allegation in the indictment.

Having doubts as to the propriety of my ruling on both of the above points I consented to reserve them for the consideration of the Justices of either Bench and the Barons of the Exchequer, in the form of a case under 11 & 12 *Vict. c. 78*, and the foregoing is the case upon which their decision is requested.

Judgment has been respited upon the prisoner, and he remains in gaol in default of sureties to receive judgment when called upon.

Counsel are to be at liberty to refer to the terms of the contract itself which for that purpose is to be considered part of the case.

J. Stuart Wortley,
Recorder of the city of London.

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This case was argued on the 21st of *January* 1854, before JERVIS C. J., WIGHTMAN J., CRESSWELL J., PLATT B. and WILLIAMS J., when the learned Judges differing in opinion desired that the case might be re-argued; and accordingly, on the 4th of *February* 1854, the case again came on for argument before the following Judges: Lord CAMPBELL C. J., PARKE B., COLERIDGE J., MAULE J., WIGHTMAN J., CRESSWELL J., PLATT B., WILLIAMS J., MARTIN B. and CROMPTON J.

Dearly, for the prisoner. This conviction is wrong, as the money was received for or on account of the railway company, and not on account of the prosecutor. To constitute embezzlement, the money must be received by the servant for or on account of the master. It is admitted that the prisoner was generally the servant of the prosecutor; but it is contended *pro hac vice* he was the servant of the company. Anyhow, the money was received for or on the account of the company. The question turns upon the special terms of the contract itself, which binds the prosecutor "to provide horses, harness, weights, and carmen for the purpose of delivering all such coal as the company shall require," and to provide "a sufficient number of steady and honest carmen and other persons for the delivery of all coals into the cellars or any other part of the premises of the

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persons for whom the coals are intended, and also for collecting and receiving, and duly accounting for, the moneys received for the same, and for all other purposes connected with the due delivery of the coals, or receiving or accounting for the moneys for the same. And that such parties shall, during the time they shall be in the employment of the said *Edward Wiggins*, his executors or administrators, obey, perform, and execute in all things connected with the carrying and delivery of coals, and receipt and payment of moneys received by them, the orders, commands, and directions of the company's coal manager or such other person or persons as may be appointed by them for that purpose. And that he the said *Edward Wiggins* or the said carmen or other parties shall day by day and every day well and truly pay, account for and deliver to the said company's coal manager all cheques, moneys, cash bills, or notes which they may at any time receive from any person or persons whomsoever for payment of all or any coals delivered by them (a)." It is submitted that the

(a) The contract, made 31st December 1851, between *Edward Wiggins* and the Great Northern Railway Company, binds the said *Edward Wiggins* to "provide horses, harness, weighing machines, weights and carmen for the purpose of delivering all such coals as the said company shall and may require the said *Edward Wiggins* to carry and deliver" &c. It also binds the said *Edward Wiggins* to "provide a sufficient number of steady and honest carmen and other persons for the delivery of all coals into the cellars or any other part of the premises of the persons for whom the coals are intended, and also for collecting and receiving and duly accounting for the

moneys received for the same and for all other purposes connected with the due delivery of the coals or receiving or accounting for the moneys for the same, and that such carmen and other parties shall, during the time they shall be in the employment of the said *Edward Wiggins*, his executors or administrators, obey, perform and execute, in all things connected with the carrying and delivery of coal and receipt and payment of moneys received by them, the orders, commands and directions of the company's coal manager, or such other person or persons as may be appointed by them for that purpose."

The contract, after prohibiting

terms of this contract merely amount to a guarantee on the part of the prosecutor to the railway company for the trustworthiness and fidelity of the carmen who might be employed, and though the carmen are no parties to the contract obedience to the orders of the prosecutor in carrying out the terms of the contract would effect a privity between them and the company. And the transaction itself shews that the authority to receive the money was given to the prisoner by the railway company, and that the prosecutor would have no authority to interfere with the carman after he had received such authority.

MAULE J. A customer who owes money to the company would only pay to one having authority to receive. The receipt and invoice is given by the company, and is evidence of the authority.

Dearly. Precisely so. It would be a contradiction in terms to hold when the railway company says "Receive this money for us," and the prisoner acts upon that authority, that he receives the money for or on account of the prosecutor, and yet this is the contention of the prosecution.

Lord CAMPBELL C. J. It is difficult to see what

such carmen from receiving any gratuity, &c., proceeds, "And that he the said *Edward Wiggins*, or the said carmen or other parties, shall and will, day by day and every day, well and truly pay, account for and deliver to the said company's coal manager all checks, moneys, cash, bills or notes which they may at any time receive from any person or persons whomsoever for payment of all or any coals delivered by them."

The contract subsequently says, "And also that he the said *Edward*

Wiggins, his executors, administrators and assigns, shall and will, during and within the first seven days of every calendar month during the continuance of this contract, send in and deliver a just and true statement of the amount earned by him in the previous calendar month for or on account of all coals delivered by him during the preceding calendar month to the company's coal manager or other the person or persons appointed by the said company to receive the same."

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1854. defence the carman would have to an action by the company for money had and received.

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Dearly. While it would be difficult to see how such a defence could be set up by the prisoner, it would appear clear that in an action brought by the company against the prosecutor he might successfully set up a defence. The difficulty arises from the fact that the prisoner is the general servant of the prosecutor, who allows him in this particular matter to act for the company.

Lord CAMPBELL C. J. What you say is that although the prisoner is the servant generally of the prosecutor *pro hac vice*, he is the servant of the company.

Dearly. Yes.

COLERIDGE J. The money is received by the hand of the prisoner, and the question is whether his hand at the time of the receipt was not in law the hand of the prosecutor, so as to make the receiving in fact in contemplation of law a receiving by the prosecutor.

Dearly. That depends upon the terms of the contract and the facts as stated in the case. The effect of the contract is to make the prisoner the servant of the company in the act of receiving, and the received invoice is evidence of the authority under which the prisoner acted, which was an authority from the railway company to receive for and on account of them and of no one else.

MAULE J. The prisoner received under a special authority from the company.

WILLIAMS J. Suppose the prosecutor discovered that the prisoner was dishonest, could he not have prevented him from holding the money and have required that it should have been handed over to him.

Dearly. It is submitted that he could not. After

the prisoner received the authority from the railway company to receive the money for or on the account of the company and acts upon that authority the prosecutor could not interfere. Supposing a person allows his servant to act for another, and he says "Go to that other person and receive his instructions," to which the servant assents ; and he is told, for instance, to take plate to a bankers, could it be said that the master of the servant could interfere and tell him to bring or take it to any other place ?

CROMPTON J.—The one contract includes both the terms of carting and receiving the money. *Wiggins* would be liable to an action for negligent driving.

Dearlsy. Yes ; and for this reason, according to the terms of the contract, the company has no controul over the horses or the driving.

Hardinge Giffard, for the prosecution.

This conviction is right. The receiving by the prisoner was in contemplation of law a receiving for his master the prosecutor, and what he did was by order of his master. The contract so far as the relationship of servant and master makes no difference ; and whatever the prisoner does under the contract differs in nowise from what he would have done under the bare orders of his master supposing no contract to have existed. Though it may be said that the company allows the prisoner to receive, yet in contemplation of law that is an authority for *Wiggins* to receive by the hands of the prisoner. The prisoner is no party to the contract, and therefore there is no privity.

WIGHTMAN J.—The carmen are to obey the manager in all things relating to the receipt of money.

MAULE J.—And they are to pay it directly to the company.

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Hardinge Giffard. Yes; but that means by the direction of *Wiggins*.

MAULE J.—The prisoner performs his duty to his master by receiving his money on account of the company. Is not that so? Well, when he has received it, on whose account has he received it? Why, on account of the company. It would be against common sense when he receives it for or on account of the company, to say that he receives it for or on the account of somebody else.

Hardinge Giffard. Suppose a collector of rents hands over to his servant the landlord's receipt, and the servant collects the rent, he does so on account of his master the collector, and not on account of the landlord.

MAULE J.—But here the person in the corresponding situation to the collector's servant has to pay over directly to the company, which is the corresponding situation to the landlord.

Hardinge Giffard. If the master had met the prisoner in the street after the receipt of the money, would not he have been entitled to have demanded it?

MAULE J.—Certainly not. The whole course of business tacitly contradicts that right.

WIGHTMAN J.—Suppose the master said to a friend, “I will send my servant to get you a cheque cashed. I have full confidence in him, and I will pay if he does not,” on whose account would the servant receive the proceeds?

Hardinge Giffard. That is hardly a similar case.

Lord CAMPBELL C. J.—If the servant lost the money by *vis major* it would be lost by the prisoner in the course of his duty to the company, and the master would not be responsible to the company for the loss.

Hardinge Giffard. There is no privity of contract, and the company could not sue the prisoner for money

had and received. *Barrow v. Husband*, 4 B. & Ad. 611.

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Lord CAMPBELL C. J.—There is abundance of evidence. *Everett v. Williams*, 15 East. We must assume that when the prisoner received the invoice, and was told to bring back the money he promised to do so.

WIGHTMAN J.—Supposing *Wiggins* to become bankrupt, whose money would be the money in the hands of the carman, received under this agreement, the money of the company or of his assignees?

CROMPTON J.—It would be a receipt by *Wiggins* in either case, and must be paid to the company.

Dearly replied.

Lord CAMPBELL C. J.—This case depends entirely upon whether the evidence shews that the money was received in the name, or on the account of his master, and this depends upon whether any privity exists between the carman and the company. If there be such privity as to make the carman the agent of the company in receiving the money, and he agreed to pay it to them, the money in his hands was not that of the master but of the company. The opinion of the majority of us is, that such privity is established, and therefore, that the money was not received on account of the prosecutor, but on account of the company. That being so, this conviction cannot be supported.

Conviction quashed.

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1854. REGINA v. SQUIRE WALKER AND THOMAS MORROD.

W. was indicted for larceny for stealing 6 lbs. of brass from a foundry. The only suggested evidence offered at the trial was that the prisoner, who was employed upon the premises, had been seen to come into the place where the brass was kept.

Held, that there was not a *scintilla* of evidence to go to the jury.

THE prisoners were indicted at the East Riding of *Yorkshire* Sessions, held at *Beverley* on the 3rd of *January* 1854, for stealing six pounds weight of brass from Mr. *Crosskill*, with a count in the indictment for receiving.

It was proved at the trial that *Walker* had worked for Mr. *Crosskill* and borne a good character for five or six years. That on the 9th of *November* he left Mr. *Crosskill's* employment. That on the 9th of *November*, *Morrod*, who was brother to *Walker's* wife, offered for sale in *Beverley* six pounds weight of brass (being that charged in the indictment as being stolen from Mr. *Crosskill's*) and a quantity of white metal similar to block tin. That the brass (which was of a peculiar kind, and was in ingots cast in moulds belonging to Mr. *Crosskill*) was usually left in a shop the door of which opened on to the road leading into Mr. *Crosskill's* works, to which workmen on the premises might have access, the door not being kept locked. That block tin and white metal were only kept in the brass foundry within this outer shop, with a door between them. That *Thomas Morrod* was employed for one week on Mr. *Crosskill's* premises in *September* last as a bricklayer's labourer, and that in such employment he would have to pass along the road into Mr. *Crosskill's* works, and might have access to the outer shop (where the metal called brass was kept), but had never been seen there; that he never had been seen in the brass foundry, and could not have gone in there without some of the workmen seeing him. That *Walker* was

employed as an iron moulder at works on the other side of Mr. *Crosskill's* yard. That he frequently went into the brass foundry to borrow tools, and had at times borrowed white metal, saying that he wanted it for purposes of casting. *Walker* was apprehended in November at Wakefield. *Morrod*, when he sold the brass on the 9th of November, stated to the person to whom he sold it that *Walker's* wife had given it to him to sell, and that *Walker* had that day left her and gone into the West Riding; which he also stated to the jury in his defence, telling them that he did not know but that it was honestly obtained. It was proved that he had given his name and address to the person to whom he sold the brass, and immediately he heard that it had been stolen from Mr. *Crosskill* had gone to see him about it.

The Chairman told the jury they were not to take what *Norrod* said as to the way he obtained the brass as evidence against *Walker*, drawing their attention to the fact that it was easy for a man who had himself stolen it to invent such a story, and that it was therefore not fair to take such into account as evidence against the other prisoner.

The jury believing that *Walker* had stolen the metal, and that *Morrod* had received it not knowing it to have been stolen, found *Walker* guilty of stealing and acquitted *Morrod*.

Mr. *Dearsly*, on behalf of *Walker*, objected that there was no evidence whatever to go to a jury of *Walker* having stolen the brass, and requested the Chairman to reserve a case for the consideration of the Court of Criminal Appeal, and the case were therefore reserved upon this point. The jury was probably partly influenced in their finding by the facts which it was omitted to prove distinctly by the prosecution, but which were nevertheless apparent in

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1854. the case, that *Walker* and his wife and her brother *Morrod* lived in one house together, and that *Walker* had left *Beverley* on the 9th of *November*, and also by the general demeanour of the prisoners. It is also impossible that they should not give some weight to what *Morrod* had said at different times as against *Walker*, believing as they did that he had sold the metal innocently, and was speaking the truth for himself.

C. W. Strickland.

Chairman.

This case was argued on the 28th *January* 1854, before JERVIS C. J., MAULE J., WIGHTMAN J., WILLIAMS J., and PLATT B.

Dearly for the prisoner. This conviction is wrong. There was not a particle of evidence to be left to the jury.

MAULE J.—Not a *scintilla*.

JERVIS C. J.—This conviction must be quashed.
Conviction quashed.

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REGINA v. BURTON.

B. was indicted for larceny. It was proved that he was seen coming

John Burton was indicted at the *January Sessions* 1854, for the county of *Middlesex*, for stealing a quantity of pepper.

out of the lower room of a warehouse in the *London Docks*, in the floor above which a large quantity of pepper was deposited, and where he had no business to be. He was stopped by a constable, who suspected him, from the bulky state of his pockets, who said, "I think there is something wrong about you," upon which *B.* said, "I hope you will not be hard with me," and then threw a quantity of pepper out of his pocket on the ground. The witness stated he could not say that any pepper had been stolen, nor that any pepper had been missed, but that found upon *B.* was of a like description with the pepper in the warehouse.

Held, that the prisoner, upon these facts, was properly convicted of larceny.

It was proved at the trial by the person having charge of the warehouse, that the prisoner was seen coming out of the lower room of a warehouse in the *London Docks*, in the floor above which a large quantity of pepper was deposited, some in bags *and some loose upon the floor*. And that the witness having suspicion of the prisoner from the bulky state of his pocket, stopped him and said, "I think there is something wrong about you," upon which the prisoner turned and said, "I hope you will not be hard with me," and threw a quantity of pepper out of his pocket on the ground. The witness further proved that no pepper was missed, and that he could not say from the large quantity of pepper that was in the warehouse that any had been stolen ; but the pepper found on the prisoner was of the like description with the pepper in the warehouse.

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The prisoner had no business in the warehouse.

It was contended by the prisoner's Counsel on the authority of *R. v. Dredge* (1 Cox. Crown Cases, 235), that upon this state of facts the Judge was bound to direct an acquittal. I overruled the objection, being of opinion that notwithstanding the statement of the witness that he could not swear that any pepper was stolen there was evidence to go to the Jury.

The Jury returned a verdict of guilty, and the question reserved for the consideration of the Court is whether I ought to have directed a verdict of acquittal or to have left the case for the consideration of the Jury.

If the Court should be of opinion that the case ought not to have been left to the Jury a verdict of acquittal is to be entered.

Judgment on the conviction was postponed, and the prisoner was committed to the House of Correction at *Coldbath Fields*.

John Adams.

1854. This case was argued on the 28th of *January* 1854, before JERVIS C. J., MAULE J., WIGHTMAN [J., WILLIAMS J., and PLATT B.

Ribton, for the prisoner, cited the case of *R. v. Dredge* (1 Cox. C. C. 235) as conclusive.

MAULE J.—The distinction is plain. That was the case of a little boy who asserted that the doll he was charged with having stolen was his own. Here the prisoner has a quantity of pepper about him, and says not that it was his own property but “Don’t be hard upon me.” The child conducted himself like an honest person.

Ribton. It is submitted that the *corpus delicti* must be proved in every case, and you cannot make any difference in the application of the rule.

MAULE J.—The offence must be proved. If a man go into the *London Docks* sober without means of getting drunk, and comes out of one of the cellars very drunk wherein are a million gallons of wine, I think that would be reasonable evidence that he had stolen some of the wine in that cellar though you could not prove that any wine was stolen or any wine was missed.

Ribton. The *corpus delicti* must be proved.

MAULE J.—Where is the rule that the *corpus delicti* must be expressly proved?

Ribton. In Lord *Hale* it is so laid down.

MAULE J.—Only as a caution in cases of murder. He does not say it is to be observed in every case.

Ribton. But the principle would be the same in every case, and was adopted by Lord *Stowell* in *Evans v. Evans*, 1 Hagg. Con. Rep. 79. There is also the case of *Hickson v. Evans*, 6 T. R. 58. He would also refer to *Starkie on Evidence*, 862.

JERVIS C. J.—We are all of opinion that there is nothing in the objection. My Brother MAULE has

already pointed out the clear distinction between this case and *Rex v. Dredge*.

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Conviction affirmed.

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REGINA v. SHARMAN.

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John Sharman was tried at the last session of the Central Criminal Court, before my Brother *Williams* and myself, on an indictment which, after stating that, at the time of committing the offences therein-after-mentioned, the rector of the parish of *Tim-mingley*, in the county of *York*, was desirous of engaging a fit person to fill the place of schoolmaster of the parochial school of that parish, and that the said *John Sharman* had made application for the said place, and the rector had required from *John Sharman*, for the purpose of satisfying him the rector, testimonials as to the qualifications and character of *Sharman*, and as to his fitness for the said place of schoolmaster, charged that *Sharman*, intending by false, fraudulent, and deceitful representations to procure himself to be appointed to the said place of schoolmaster, falsely, knowingly, and deceitfully, did make, forge, and counterfeit, a certain writing to the likeness and similitude of, and as for a genuine writing of, and under the hand of *Robert Henry Johnson*, the rector, of the parish of *Lutterworth*, in the county of *Leicester*, with intent in so doing to injure, prejudice, and deceive, which writing was as follows :—

“ Gent.

“ Mr. and Mrs. *Sharman* have been known to me for some years, and for some time they had the charge

S. was indicted for uttering a forged document, purporting to be a certificate from a clergyman, that he had the charge of a large school, and that he had conducted it under that clergyman's superintendence with ability and success.

Held, that the conviction was good at common law, and that it is an offence at common law to utter a forged instrument, the forgery of which is an offence at common law, and that the effecting of the fraud is immaterial.

1854. of a large school under my control and superintendence, which they conducted with great ability and success; indeed committee, parents, and children, were sorry when they resigned, and some of the latter presented them with some small tokens of their esteem.

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“ I have, therefore, very great pleasure in bearing my testimony to their excellent moral character, and their suitability for the office of instructor to the rising generation, and can with confidence recommend them for the situation they seek, knowing them to be peculiarly adapted for the right management of children.”

“ *R. H. Johnson.*”

12th *November* 1853.

The 2nd and 3rd counts charged the forgery more generally.

The 4th, 5th, and 6th counts (which otherwise corresponded with the 1st, 2nd and 3rd, respectively), charged *Sharman* with having uttered the forged writing, knowing it to be forged. The prosecutor proved the following facts:—

On the 7th of *December* last, the situation of schoolmaster of the parish school of *Timmingley*, in *Yorkshire*, was vacant, and *Sharman* had applied for it, and had sent in to the rector of that parish papers purporting to be copies of certificates of character, and amongst them one purporting to be a copy of a testimonial from the Rev. *Robert Henry Johnson*, the rector of *Lutterworth*. On that day, which had been appointed for the production of the original testimonials, *Sharman* attended for that purpose in *Parliament-street, Westminster*, at the office of Mr. *Baxter*, a parliamentary agent, who had been authorized by the rector of *Timmingley*, to inspect and examine them.

On that occasion being required by Mr. *Baxter* to produce the original of the writing, purporting to be a copy of a testimonial from the rector of *Lutterworth*, he produced the writing set forth in the indictment; and, in answer to Mr. *Baxter's* questions, falsely stated that it was the testimonial of the rector of *Lutterworth*, and bore the rector's signature. In fact the document had not been written or signed by the rector, but was altogether a forgery.

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The jury acquitted him of the forgery, but found him guilty of uttering the forged document, knowing it to be forged, with intent to obtain the emoluments of the place of schoolmaster, and to deceive.

Judgment has been postponed in order to obtain the opinion of the Court of Appeal whether the act of which the jury have found *Sharman* guilty is an offence by the common law.

T. J. Platt. *Platt*

19th January 1854.

This case was argued on *January 28th 1854*, before JERVIS C. J., MAULE J., WIGHTMAN J., PLATT B., and WILLIAMS J.

No Counsel appearing for the prisoner.

Clarkson was called upon on the part of the Crown. It is submitted this uttering was an offence at common law. The evidence discloses the deception and the attempts to acquire the emoluments of the situation.

MAULE J.—Is there authority for saying that the falsely making the document in question is an offence at common law?

Clarkson. There is the case of *Rex v. Toshack*, 1 Den. C. C. 492. I could also refer to 2 *Russell on Crimes*, 216.

WILLIAMS J.—In the case of *Reg. v. Boult*, (2 C. &

1854. K. 604), it was held an offence at common law to forge a railway pass, but not an offence to utter a forged railway pass unless the fraud succeeded. Here the attempt at fraud was ineffectual. The case of *Reg. v. Boult* was a decision of my Brothers CRESSWELL and PATTESON, and notwithstanding the high authority, I confess I entertain great doubts upon that case.

Clarkson. There is a precedent in *Tremayne's P. C.* 129, for forging and uttering at common law; and that seems to indicate the principle of the common law.

WILLIAMS J.—My Brother Erle, in *R. v. Smythies*, (1 Den. C. C. 498), reserved a question, notwithstanding that *R. v. Boult* was cited.

Clarkson. I would, as a general proposition, say the wilful attempt of a person to effect his objects by a deception put into writing must, at common law, be a misdemeanor.

JERVIS C. J.—We are of opinion that is a common law offence to utter a forged instrument, the forgery of which is an offence at common law. We think that the view of the law taken in *R. v. Boult* was not a correct one.

MAULE J.—I am of the same opinion. I may state I am not prepared to adopt in its terms the proposition last stated by Mr. *Clarkson*.

The other Judges concurred.

Conviction affirmed.

REGINA *v.* GILL.

1854.

Samuel Gill was convicted at the Clerkenwell Sessions 1853, for stealing one crown piece, the property of his master.

It was proved at the trial that the master, who was a licensed victualler, suspecting the prisoner, marked the crown piece in question and two half-crowns, and gave them to one *J. W.* for the purpose of purchasing spirits of the prisoner, who was the prosecutor's barman. *J. W.* accordingly, early the next morning, purchased at the bar some brandy, and paid the prisoner with the marked money, and it was his duty to have placed the same in the till. When his master came down he looked into the till, and found there the two half-crowns only. Upon the prisoner being charged with the offence, he admitted the receipt of the crown piece, but said he had given it away as part of the change for half a sovereign. The crown piece was found in a bag in his box, separate from his other silver, and wrapped in paper.

The jury acquitted the prisoner of larceny, and found him guilty of embezzlement.

The judgment has been respited, and the prisoner committed to the House of Correction at Coldbath Fields to abide the decision of this case.

The question reserved for the consideration of the Court is, whether upon the facts as proved the offence is larceny or embezzlement.

John Adams, Assistant Judge.

G. was the prosecutor's servant, and received over the counter, for the prosecutor, a piece of marked money, which the prosecutor, who suspected the prisoner, had given to another to go and buy spirits of the prisoner at the prosecutor's public-house. The prisoner made away with the money.

Held, that he was guilty of embezzlement.

This case was argued on the 28th of January 1854,

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before JERVIS C. J., MAULE J., WIGHTMAN J., WILLIAMS J., and PLATT B.

No Counsel appeared for the prisoner.

Clarkson for the Crown. The prisoner was guilty of embezzlement, as the money was altogether out of the hands of the master.

JERVIS C. J.—It is the case of *Rex v. Peck* (2 Russ. 218) which creates a difficulty. There the money was received from the master to pay a third person, and that was not within the act. Where money was given to one servant to give another, as in *Murray's case*, (1 Moo. C. C. 276), that was held not to be within the act. Then comes *Rex v. Hedges*, 2 Leach, 1033. The master gave a stranger money to try the servant's fidelity, and the servant converted the money to his own use. That was held to be embezzlement within the act.

Clarkson. Here, as in *Hedges' case*, the master parted with the possession.

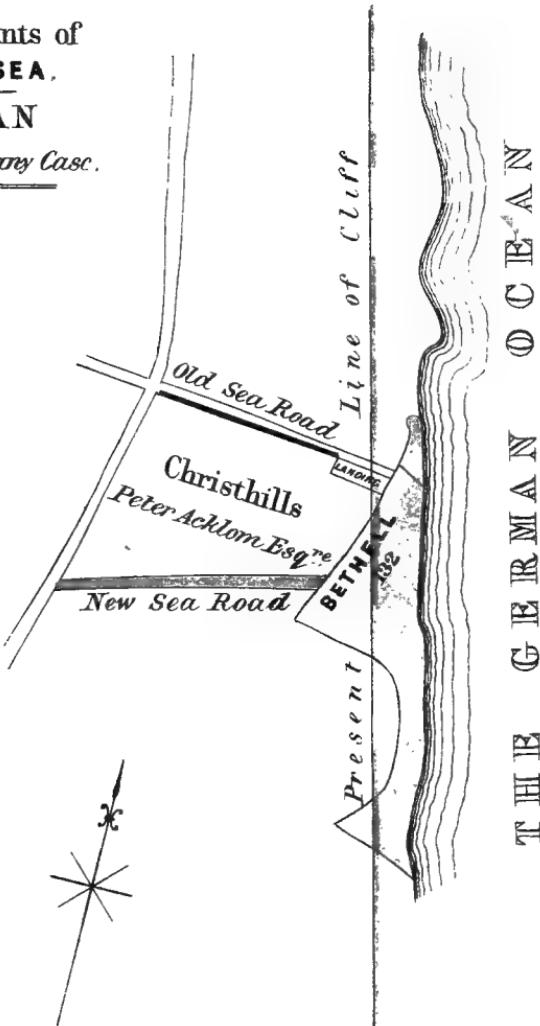
JERVIS C. J.—We must be bound by authorities which are express, and in this case we are bound by *Rex v. Hedges*.

MAULE J.—I think so too. There may be a distinction between the cases in which the master parts with the possession retaining it constructively, and those in which he does not.

The other learned Judges concurred.

Conviction affirmed.

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To accompany Case.



THE QUEEN, on the prosecution of JOHN GAL- 1851.
 LOWAY, *against* the Inhabitants of the Parish of
 HORNSEA.

THIS was an indictment for the non-repair of a highway, tried before me at the *Yorkshire* Spring Assizes 1853, and I herein state the facts of the case proved before me, in order that the questions of law arising thereon may be fully considered and determined by the Justices of either Bench and the Barons of the Exchequer, in pursuance of the statute.

The road, in respect of which the indictment was preferred, was described in the indictment to be a certain common and public Queen's highway, called the *Sea Road*, leading eastward from the east end of a street in *Hornsea*, in the East Riding of the county of *York*, called *Eastgate*, to the *German Ocean*; and the indictment alleged that a certain part of the same common and public Queen's highway, situate, lying and being in the parish of *Hornsea*, in the said East Riding of the county of *York*, containing in length divers, to wit, 210 feet, or thereabouts, and in breadth divers, to wit, 40 feet, or thereabouts, on the 1st day of *July A.D. 1852*, and continually afterwards, until the present day, was, and yet is, very ruinous, deep, broken and in great decay, for want of due repairing and amendment.

In the year 1801, an act passed (41 *Geo. 3*), entitled "An Act for dividing, allotting, and enclosing

beach, the encroachments of the sea having destroyed the road, so that the subject of repair was not in existence.

This Court will not entertain a question of costs which is not within their jurisdiction, although it is expressly agreed by a case reserved that the Court should have the same power, with respect to such costs, as the Judge could legally have exercised at the trial.

An indictment charged that certain part of a highway was out of repair. Part of the road had, at the time when the indictment was preferred, been destroyed by the encroachments of the sea, and the surface of the existing road was in good repair up to where the same had been so destroyed, at which part the road was terminated by a perpendicular cliff, caused by successive encroachments.

Held, that there was no obligation on the parish to provide an available carriage-road down to the

1854. the open arable fields, meadows, pastures, common

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and waste lands within the parish of *Hornsea*, in the East Riding of the county of *York*, and for making a compensation in lieu of the tithes thereof, and of ancient enclosed lands in the same township." And by this act it was enacted that the commissioners should, before they proceeded to set out the allotments thereafter mentioned, set out and appoint in, over, and upon the said lands and grounds thereby directed to be divided and enclosed, such public and private roads, and such places for getting stone, lime, gravel, and other materials, for the repairs of the several public highways within the township of *Hornsea* aforesaid, and for the erecting or repairing of certain houses &c. within the same township, and should set out and appoint such places for common watering places for cattle, and likewise such hedges, fences, banks, ditches, drains, watercourses, sewers, bridges, gates, stiles, and other requisites, in, over, through or upon all or any of the same lands and grounds thereby directed to be divided and enclosed as they should judge proper, convenient, or necessary, and should and might stop up, alter, turn, or discontinue any old roads, sewers, watercourses, becks, drains, sloughs, or banks therein, and by and with the consent of the owners and proprietors thereof, but not otherwise, in the ancient enclosed lands of the same township, or any of them, as they should think necessary or convenient; and the said public roads should be and remain forty feet in breadth at the least, between the ditches or fences; and after the said public roads should have been set out as aforesaid the said commissioners should, and they were thereby empowered and required, by writing, under their hands, to appoint one or more surveyor or surveyors of the public roads, and such surveyor or surveyors should cause the same public

roads to be properly formed and completed, and put into good and sufficient repair, and should be allowed such salary or reward for his or their trouble therein as the said commissioners should, by writing under their hands and seals direct and appoint, which salary or reward, and also the expenses (over and above the statute duty) of first forming the said public roads, and of putting the same into good and sufficient repair, should be raised in like manner as the charges and expenses of obtaining and passing that act, and the carrying the same into execution, were thereby authorized and directed to be raised, and that none of the inhabitants of the said township of *Hornsea*, other than the persons respectively to whom any allotment or allotments should be made by virtue of that act, should be charged or chargeable (over and above the statute duty) towards the forming and putting the said new public roads into repair until the same should respectively be made fit for the passage of travellers and carriages, and should have been certified so to be by the said surveyor or surveyors by writing under his or their hand or hands, to be delivered to the clerk of the peace at some quarter sessions of the peace to be holden for the East Riding of the county of *York*, and until such certificate should have been allowed and confirmed by the justices at such sessions, which said certificate should be so delivered to the clerk of the peace at the quarter sessions held next after the same public roads should be formed and put into good and sufficient repair respectively as aforesaid, and within the space of two years next after the execution of the said award of the commissioners, unless sufficient reason be given to the satisfaction of the said justices that a farther time was necessary for that purpose, in which case the said justices might and they were thereby empowered to allow such further time for

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the delivering in the said certificate as they should think proper not exceeding one year, and in case the said surveyor or surveyors should neglect or refuse to deliver in such certificate within the time before limited, such surveyor or surveyors should forfeit and pay any sum not exceeding twenty pounds nor less than ten pounds, to be recovered in like manner as any other penalty was by that act authorized to be recovered, and the same should be applied towards defraying the expenses of carrying that act into execution in such manner as the said commissioners should direct, and that after such certificate should have been delivered to the said clerk of the peace by the said surveyor or surveyors as aforesaid, and should have been allowed and confirmed at such sessions, the said public roads should be from time to time amended and kept in repair in the same manner as other public roads were by law to be amended and kept in repair, and that after the execution of the award of the said commissioners, it should not be lawful for any person or persons to use any roads, either public or private, in, over, through, or upon the said lands and grounds thereby directed to be divided and enclosed, or any of them, or any part thereof, either on foot or with horses, cattle, or carriages, other than such as should be set out and appointed by the said commissioners by virtue of that act, and that all former roads which should not be set out and appointed as the roads and ways through or upon the said lands and grounds thereby directed to be divided and enclosed, should be deemed part of the same lands and grounds to be divided and allotted by virtue of that act.

It was also provided and enacted, that, so soon as conveniently might be after the said commissioners should have set out and appointed such public carriage roads as aforesaid, they should give notice thereof in

a certain newspaper; and that it should be lawful for any person dissatisfied with the setting out, appointment, or disposition of any of such public carriage roads as aforesaid (on giving such notice to any one commissioner, and entering into such recognizances with sureties conditioned to try such appeal as therein respectively mentioned), to appeal against all or any of such public carriage roads to some general quarter sessions of the peace, to be held in and for the said East Riding within four calender months next after the setting out, appointment, and disposition of the said roads and notice thereof given as aforesaid, and be heard by himself, counsel, agents, attorneys, and witnesses; and that the commissioners, &c., should attend at such sessions, and the justices before whom such appeal should be made, should, on hearing the evidence, finally determine whether the said public carriage roads so appealed against should be made, or whether any other public carriage roads should be set out, and should make and give such orders and directions touching the matter before them, and award such costs as to them should seem necessary and expedient in that behalf, and such determination should be final and conclusive to all parties concerned, and should not be removed or removeable by certiorari, &c.; but in case no such notice should be given to one of the commissioners as aforesaid, or such recognizance should not be entered into, or such appeal should not be proceeded in as aforesaid, then such setting out, appointment, and disposition of the said public carriage roads by the said commissioners as aforesaid, should be final and conclusive to all and every person and persons whomsoever.

It was also further enacted that the awards should (amongst other things) describe all manner of public and private roads, stone pits and common watering

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of HORNSEA. fences and other works and improvements which should be set out, directed, or appointed by virtue of that act, and that a plan should be annexed to the award specifying and describing (amongst other things) all public and private roads, stone pits, common watering places for cattle, sewers, drains and watercourses which should be set out or appointed by virtue of that act, and all other matters and things proper or necessary to be described therein.

When this act passed the road in question existed as a public highway, and was called the *Sea Road*. The commissioners made their award in 1809, and awarded (amongst other things) as follows: "And we do direct, set out, appoint and award that there shall be one other public highway or road of the breadth of forty feet as the same is now staked, ditched and bounded out, called the *Sea Road*, leading eastward from the east end of a street in *Hornsea* called *East Gate*, over ancient enclosed lands belonging to *Christopher Jackson*, and over *Horr Carr* and *Chrystals* to the *German Ocean*." In another part of the award they awarded thus as to a place abutting on part of the *Sea Road*, and called the *Landing Place*." And we do set out, allot and award one acre of land (be the same more or less), situate, lying and being in the east field of *Hornsea* aforesaid, for the purpose of a landing place adjoining the *Sea Road* on the north ancient enclosed lands of *Charlotta Bethell* on the east, and on lands herein awarded to *Peter Acklom* on the south and west."

The above mentioned act of Parliament and award may be referred to by either party on the argument of this case, and every thing directed by the act to be done in reference to the road and landing place is to be deemed to have been done, and that the road was

a lawfully existing road under and by virtue of the said act and award.

The plan which accompanies this case is (with the addition of the red line to mark the course of the new road hereinafter mentioned and the blue line shewing the present line of cliff, *March 5, 1853,*) a copy of part of the plan annexed to the award, and the road in question is called thereon the *Sea Road*, and is partly coloured black, and is the road set out in the award as above inserted. The land numbered (132), and coloured green on the plan, is what is described in the award as to the landing place the ancient enclosed lands of *Charlotta Bethell* (No. 132 on the plan).

It was proved that at the time when the road and landing place were set out, the land of *Charlotta Bethell* was or had been swarth land, and was in the occupation of one *Simpson* as her tenant, and was ancient enclosed lands, but had for a long period been encroached upon by the sea, and at the time of making the award was partially covered with sand and gravel, and was entirely sand between the entrance to the road in question and the sea.

It was also proved, that both before and after the award all persons were accustomed to go down the *Sea Road*. No evidence was given that any repairs had ever been made eastward beyond the western boundary line of *Charlotta Bethell's* land. Nor was there ever any defined road beyond that line eastward, but people used to go eastward of the said line to the sea upon the said ancient enclosed lands marked (132), as and where they pleased and could, with carriages, carts, horses, and on foot, for the purposes of getting gravel and sand from the sea shore, or any other purpose they thought proper, and vessels occasionally brought cargoes of coal and anchored at high water,

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where they safely could near to the entrance of the road in question ; and all persons, at their pleasure, took carts to the vessels' side, and loaded their carts with the coal, and drove them away where they could and pleased, over (132), to the entrance of the road in question, and thence up the said road westward into the interior of the country. It was also proved that barges were in the habit of bringing limestone near to the entrance of the said road at high water, and then throwing it overboard on (132), when the same had become covered by the encroachments of the sea, or anywhere thereabouts ; and that carts from the country were brought in the same manner as before stated, at the pleasure of any one, down the said road, and thence to where the limestone lay, which was then loaded upon them, and they were then driven away over (132) to the entrance of the *Sea Road*, and that the said landing place was principally used for the deposit of gravel so collected as aforesaid. The road, both before and for a considerable time after making the award, sloped gradually down towards the sea, which in extraordinary high tides came up to the landing place, but at other times came only about so far as shewn on the said plan. The *Sea Road* has, since the making of the said award, been repaired by the parish up to the varying termination of the road, as the same was from time to time swept away by the sea in such encroachments, and the passage down to the beach has been dealt with as hereinafter mentioned.

For many years the sea has been making encroachments upon this part of the coast, and within the forty-four years since the making of the award, the high water mark has advanced 104 yards inland. The whole of the said ancient enclosed lands of *Charlotta Bethell*, eastward of the said road, had been thus

swept away by the sea, as has also about one-half of the said landing place, and about fifty-two yards of the said road westward of the said ancient enclosed lands. The annual average destruction of the cliff along the coast there is about two yards and a-half, but upon the occasion of storms, sometimes three or four, and sometimes four or five yards of the said cliff in depth, westward, where the said road lies, and of the length of the said road, have been swept away at one tide. The land there is throughout of alluvial sand and clay, inclined to gravel, and easily washed away by the sea. About twelve or fourteen years ago the sea made a considerable inroad, and the consequence was, that instead of a gradual slope down towards the sea, a steep perpendicular descent or face was made some distance up the road, westward of the said ancient enclosed lands of *Charlotta Bethell* (132), which rendered it impossible for carriages and carts to get down to the beach. The then parish surveyors caused a gap to be cut through this perpendicular face, and made a road passable for carriages and carts down to the then beach, although steeper and less commodious than before. This continued for some time, but within the last few years the encroachments of the sea have much increased, and at the time when the justices made the order for this indictment, and also at the time of the preferring it, nearly one-half of the extent of the road along the landing place originally awarded having, together with so much of the landing place, been destroyed, the termination of the road towards the sea became, and now is, a perpendicular cliff or bank, upwards of twenty feet high, which renders it impossible for any carriage or cart to get down to the beach, though a track has been made practicable for donkeys. The plan correctly shews the

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former and present lengths of the road, and the former and present lines of high water mark.

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It was proved also, that a new road to the sea has been lately made, which is coloured red upon the plan, and there called *New Sea Road*, which is now used by the public. It was also proved that a rate of 2*s. 6d.* in the pound in the parish will produce between 500*l.* and 600*l.*, and that the ordinary annual expenses of the repairs of the parish road is about 200*l.*

Evidence was also given that the expense of making a substantial road of concrete, extending about fifty yards beyond the cliff would be about 600*l.*, and that the annual cost of repair, and of keeping the same in connexion with the cliff, notwithstanding the annual destruction of the same, westward of the road or pier, by the encroachments of the sea, would be about 10*l.*; but such a road or pier must extend forty feet beyond and below high water mark at ordinary tides, and be forty-six feet wide at the base, having sloping sides, and forty feet wide at the top or surface.

Evidence was also given that the cutting of a gap, and protecting it with side-walls, would cost about 200*l.*, and an annual cost of 7*l.* or 8*l.* for repairs. On the other hand, evidence was given on behalf of the defendants, that the making such a gap with wings or side-walls, an effective and permanent road down to the beach, and an annual expense of from 50*l.* to 100*l.* for repairs. That such a gap would not prevent the encroachments of the sea, and that the masonry and flanking walls of such wings would require to be frequently moved inland, as they became outflanked by the encroachments of the sea; and that as the sides of the gap must be sloped if the road were made with a gradient of one foot in twenty, the cutting

must be commenced at 400 feet inland of a width gradually increasing to the edge of the cliff, where it must be ninety feet wide at the surface level of the adjoining land, and with such a gradient would give no access to the landing place, or to the land opposite in that gap.

I asked whether Counsel on either side desired that I should leave any question to the jury, and they stated not.

A conviction of the parish surveyors by the justices, for the non-repair of the road, and an order to repair it under stat. 5 & 6 Wm. 4, c. 50, s. 94, dated 2nd September 1852, was, after being objected to, put in evidence, and may be referred to as part of this case, subject to any objection. But it seemed to me immaterial. It was, in fact, made after the encroachments of the sea had completely stopped the road, but before the cliff was rendered so precipitous as it is at present. No repairs were ever made under that order, and it was proved that the indictment was preferred by Mr. *Galloway*, at the instigation of a Mr. *Cunnington*, who is the owner of an hotel and some property immediately adjoining the termination of the road in question, bounded on the south by the said road, and on the east by the sea.

It was admitted that the surface of the existing road was in good repair up to where the same had been swept away by the destruction of the cliff by the encroachments of the sea.

I directed a verdict of Guilty to be entered, subject to the opinion of the Justices and Barons upon the following questions:—

Whether there exists a legal duty or obligation upon the parish to provide an available carriage road down towards the beach.

If such duty or obligation exists, the verdict is to

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stand ; if not, the verdict is to be set aside, and a verdict of Not Guilty entered.

If the Justices and Barons be of opinion that such duty exists, they are requested to state what is the description of the road which it is incumbent upon the parish to provide ; and it was agreed at the trial that they should have power to order any fact to be ascertained, by a surveyor or otherwise, in order to enable a final and conclusive judgment to be given upon the indictment.

It was also agreed that they should have the same power with respect to costs, as well of the trial as of the argument upon this case, as I could have legally exercised at the trial or afterwards.

S. Martin.

On the 11th *February* 1854, this case was argued before JERVIS C. J., MAULE J., WIGHTMAN J., WILLIAMS J., and PLATT B.

Bliss Q. C. (with him *P. Thompson*) for the defendants. The sea having swept away the land over which the road formerly went, the obligation to repair is gone with the road (*a*).

(*a*) This was the second head of the argument of the Counsel for the defendants, and as it was upon this point alone that the judgment of the Court proceeded, the arguments on the other points are omitted. The other contentions by the Counsel for the defendants were, 1. That on the facts of the case there never was a highway to the *German Ocean*, and for this position *Rex v. The Inhabitants of Hatfield*, 4 Ad. & El. 156, was cited. 3. That the parish did not possess the power to make a road, either by a gap or by embanking, and that their doing so would involve injuries to the owners of the soil, to the sea bank and to the navigation and fishery ; and on

this point the following authorities were cited : *Ro. Abr.* 392. *Letter B.*, pl. 1, 2. *Goodtitle v. Alker and Another*, 1 Burr. 133. *Blundell v. Catterall*, 5 B. & A. 296, 305 ; 4 Vin. Abr. tit. *Chemin*, pl. D. 1. *Callis on Sewers*, 73, 74. *Attorney General v. Richards*, 2 Anstru. 603. *Stat. of Sewers*, 22 Hen. 8. *Stat. 7 & 8 Geo. 4*, c. 30, s. 12. *R. v. Stanton*, 2 Show. 30. *Year Book*. 8 Hen. 7, 5. *Woolrych on Water Rights*, 172. 4. That if any obligation existed, it extended only to reasonable repairs, and that the repairs here required were unreasonable, and would be fruitless, and on this point *Rex v. Landulph* (1 M. & Rob. 394, 395 n.) was cited.

JERVIS C. J.—The question is whether there is a highway to repair. You say the highway does not now exist.

MAULE J.—It is stated in the case that the road up to where the sea has swept it away is in good repair; and the question is, whether the parish is bound to reinstate that part of the highway which has been swept away, and then to repair it.

Bliss. That question was decided by the case of *Regina v. Bamber*, 5 Q. B. 279. There the road which the defendant was charged with liability to repair, and the land over which it passed were washed away by the sea, and to restore the road the defendant must have created part of it anew, and all the materials of which a road could have been made had been swept away by the sea. Under these circumstances, it was held by the Court of Queen's Bench that the defendant's liability had ceased. Again, in *Regina v. The Inhabitants of the Parish of Paul* (2 Moo. & Rob. 307), on an indictment for the non-repair of a highway in the ordinary form, it was held by Mr. Justice MAULE that the parish could not be convicted for not rebuilding a sea-wall washed away by the sea, over the top of which the alleged way used to pass. In that case Mr. Justice MAULE says—“The interruption of the passage is not from the want of repair, but from the sea having washed away the wall or embankment, and there is no longer anything for them to repair.” So in this case, the sea having washed away part of the road, there is, as to that part, no longer anything for the defendants to repair. In *The King v. Montague and Others*, (4 B. & C. 598), it was held by the Court of Queen's Bench, that a public right of navigation may be extinguished by natural causes, such as a recess of the sea. In that case Mr. Justice *Littledale* says—“It appears to me

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a more reasonable presumption that the passage, if it ever existed, was stopped up by natural causes, by the recess of the sea, or by an accumulation of silt and mud, which we know by experience is constantly going on in many of the harbours of this country, and by which they would eventually be choked up, unless artificial means of cleansing them were adopted."

MAULE J.—There was a case on the Midland Circuit which is not reported, in which a road was charged in the indictment to have existed from time immemorial, but it was shewn that although there were traces of a road, the road itself had not in fact existed as a road for a great many years, and there were upon it quarries and trees more than one hundred years old, and it was held to be no highway. Whether there is a road or not, is a question to be decided by inspection.

WILLIAMS J.—If the sea had retreated instead of gained, would the parish be bound to repair to the sea?

Bliss. I apprehend not.

JERVIS C. J.—If the sea imperceptibly retreated, there might be an obligation to repair to the sea, but not if the sea retreated visibly and at once.

Bliss then proceeded to argue the other points raised on behalf of the defendants, and which are referred to in a note (*a*), *ante*, p. 302.

Hall R. (with whom was *W. S. Cross*) for the prosecution. There is a great fallacy in supposing that there is a single inch which has ceased to be a highway. The sea is the only terminus of highways, and the whole of the road was and is a highway to the German Ocean. For a certain number of yards, the road is over the sands, and the parish is bound to repair that portion of the road in such a manner as it is capable of being repaired, although they would not be bound to metal it as they would other parts of the road. It cannot be disputed that the highway exists

to the edge of the cliff, and also exists from the foot of the cliff across the sands to the ocean. There is also a road down the cliff, although it is not one easy of access. A carriage or cart cannot get by it down to the beach, but the case expressly finds that a track has been made practicable for donkeys, and carriages may be brought to the edge of the cliff, and to the foot of the cliff, and other measures are resorted to to raise coals and other articles up the face of it.

MAULE J.—The indictment does not charge that there ought to be a public highway, but that there is one. What part of the road do you say is out of repair?

Hall. We say that there is a highway, that the line of road is down the cliff, although the public must in its present state get up and down as they can; and if that be so, the parish are bound to repair it. The road has become impassable by the defendants suffering it to come to an abrupt interruption, by not taking means to prevent the slope being washed away.

MAULE J.—The road was on that slope, and the slope has been washed away by the sea. Suppose a man to stand on the top of the cliff and look on to the beach, would he see any subsisting road down to the beach? The road is gone. What is it you say the parish are bound to do?

Hall. I do not say what the precise thing is which they must do. There were contradictory opinions upon that subject given by the witnesses on the trial, and if the Court is of opinion that the obligation to repair exists, your Lordships are requested, by the case, to state what is the description of road which it is incumbent upon the parish to provide. In *Reg. v. The Inhabitants of the Parish of Paul* (2 Moo. & Rob. 307, cited on the other side) the indictment was

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1854. for not rebuilding a sea wall, and there never was in fact a road over the wall.

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WILLIAMS J.—Does it affect your argument whether it is to be taken that the road does not exist, or that it has become impassable by the act of God?

Hall. The want of repair is not caused by the act of God, but by the neglect of the parish in not preventing the encroachments of the ocean.

MAULE J.—Probably there were roads over the *Goodwin Sands* from *Margate* when the land was in continuity with the isle of *Thanet*; but I do not suppose any one will say that the parish would now be bound to repair them. There is no such thing as an absolute right against the act of God. To restore this road would be an engineering work of considerable difficulty and expense. When the common law was formed, such great engineering works were not contemplated.

Hall. The other side contended that there never was a highway to the *German Ocean*. We say that there was, and if so, when did it cease to be a road? If there is now a road, although it is impassable, the parish are under an obligation to repair it.

JERVIS C. J. In what way? You cannot cut down perpendicularly. The depth would render it necessary to slope the sides, and you cannot do that because you have no right to remove the land of the adjoining owners.

Hall. The right of soil might be compensated. The shingles being removed is the cause of the cliff going, and the parish ought to have preserved the sea bank. He then referred to an old commission in 3 *Rich.* 2, relating to a great flood at *Winchelsea*. *Fitzherb.* N. B. 127 D.

MAULE J.—The result of the form of this indict-

ment is, that if there is no highway, the case does not exist in which the liability in question can fall upon the parish. The indictment says that there is a highway, and that it is out of repair; but the case finds distinctly that that part of the road which the indictment alleges to be out of repair has, in fact, been washed away by the sea, so that the subject of repair is not in existence. All that exists of the road is in good repair. The judgment of the Court must be for the defendants.

WIGHTMAN J.—I am of the same opinion. The subject-matter is gone. The indictment charges that there is a highway, and that it is out of repair; but the case shews, that the part of the road alleged to be out of repair has been swept away by the encroachments of the sea. That part of the road is gone, and such part of the road as has not been swept away is in good repair. The real charge is, that the defendants did not make the highway, and not that they did not repair it; and, as my Brother MAULE has observed, in order to create an obligation to repair, there must be something in existence capable of being repaired.

WILLIAMS J.—I am of the same opinion. It is sufficient for us to say that there is no highway to be repaired (*a*).

Judgment for defendants.

Hall then mentioned the subject of costs.

Bliss claimed the right to begin; but the Court held that the question of costs was not one within their jurisdiction, and refused to entertain it, although it was expressly agreed by the case that the Court

(*a*) *JERVIS C. J.* and *PLATT B.* were not in Court when the judgment was given.

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1854. should have the same power with respect to costs as the Judge could legally have exercised at the trial (a).

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(a) As to the question of costs, see 5 & 6 Wm. 4, c. 50, s. 95. *R. v. Martin*, 2 Q. B. 1037 n. *R. v. Chedworth*, 9 C. & P. 285. *R. v. Clark*, 5 Q. B. 887. *R. v. Heanor*, 6 Q. B. 745. *R. v. Paul*, 2 M. & Rob. 307. *R. v. Justices of Surrey*, 16 Jur. 641.

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REGINA *v.* OVERTON.

O. was indicted for embezzlement, and for the purpose of proving his identity as the person receiving certain moneys from *S. & Co.* for the prosecutors, an entry in a book of *S. & Co.* was read in evidence. The account was kept in four columns, in the first of which was entered the dates; in the second the name of the person on whose behalf the money was received; in the third

At the general session of oyer and terminer and gaol delivery, holden for the jurisdiction of the Central Criminal Court, on the 28th November 1853, *Henry Nelson Overton* was tried and convicted before me of embezzling the two sums of 23*l.* 14*s.* and 12*l.* 4*s.* 6*d.*, received by him on account of his masters, *Joshua Proctor, Brown, Westead*, and others.

Thomas Stone, a clerk in the employment of Messrs. *Shoolbred & Co.*, deposed to having paid two cheques for those amounts on account of the said *Joshua Proctor, Brown, Westead & Co.*, trading under the firm and style of the *Patent Wadding Company*, to a person who, at the time of the payment, named the amount due to his employers, and subscribed the entry in the book of Messrs. *Shoolbred*, which was produced at the trial. This book was kept in the form of the *facsimile* hereunto annexed. In one of the columns were entered the names of all the creditors who had supplied

the signature of the person receiving; and in the fourth the amount of the particular payment made by *S. & Co.*

Held, that the entry, as explained by the evidence, amounted to a receipt, and that even for the purpose of proving identity, the whole entry could not be read without a stamp, and that therefore the conviction was wrong.

the firm of *Shoolbred & Co.* with goods, and in the last column, and opposite to the names of the creditors, were entered all the sums due to each, and in an intervening column was written the signature of the person who received the money at the time when each account was paid. The course of business was this; *viz.*, when any person called for the amount due to any creditor whose name was entered in the book, he was asked the amount of the debt claimed, and if the amount thereupon named by him corresponded with the amount entered in the book, the debt was immediately paid by Messrs. *Shoolbred's* clerk, and the person receiving it was required to sign his name in the middle column of the book, intervening between the name of the creditor and the sum entered as the amount of the debt. No other receipt was required or taken by Messrs. *Shoolbred*; but, on the other hand, if an entire stranger to both parties called for the debt, and mentioned the amount correctly as entered in the book, he would receive the money upon writing his signature opposite the entry as above described.

Mr. *Parry*, for the prosecution, tendered this entry in evidence, and proposed, by means of the signature, to identify the prisoner with the person receiving the cheques.

Mr. *Ribton*, for the prisoner, contended that the entry, and objected that being unstamped (which was the fact) it was inadmissible against the defendant either in whole or in part.

I overruled the objection, and received the entry in evidence.

It appearing that the signature was that of the defendant, and the other necessary facts having been proved, the defendant was convicted.

Entertaining, however, some doubts upon the correctness of my ruling, I consented to reserve the point

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1854. for the Justices of either Bench, and Barons of the Exchequer, in pursuance of 11 & 12 Vict. c. 78. And the foregoing is the case upon which their determination is requested, and whether the entry in the book was a receipt for money within the Stamp Acts ; and whether, being unstamped, it was improperly admitted in evidence ?

OVERTON's Case. Judgment has been respited upon the prisoner, and he stands committed to *Newgate*, awaiting the result of this case.

J. Stuart Wortley,
Recorder of the City of London.

This case having been sent back for amendment in the manner required by the order of the Court for the consideration of Crown Cases Reserved, (a) pursuant to the statute 11 & 12 Vict. c. 78, bearing date the 21st *January A.D. 1854*, I now state that the signature

(a) *Court for the Consideration of Crown Cases Reserved, pursuant to the statute 11 & 12 Vict. c. 78.*

At a sitting of the said Court, holden at *Westminster*, on the 21st day of *January*, A.D. 1854, before the justices of either Bench and Barons of the Exchequer, the Lord Chief Justices of the Court of Common Pleas presiding, assembled for the purpose of hearing and determining questions of law reserved for their consideration, under and by virtue of the statute in that behalf.

A case having been transmitted from the Recorder of *London* to the said Justices and Barons, setting forth the conviction of the said *Henry Nelson Overton*, at a session holden for the jurisdiction of the Central Criminal Court, and stating certain questions of law which had arisen upon his trial,

and been reserved for the consideration of the said Justices and Barons, and the said Justices and Barons having duly proceeded to the hearing and determining of the said questions : It was considered by the said Justices and Barons that the said case required amendment, and that the same should be amended so as to disclose whether the whole of the entry therein referred to was tendered in evidence upon the trial of the said *Henry Nelson Overton*, and whether the said Recorder had ruled that the whole of such entry might be read in evidence, or the signature of the said *Henry Nelson Overton* thereto only, and if the whole of the said entry had been given in evidence, or used before the jury upon the said trial.

Marshall Straight,
Clerk of the said Court.

was offered in evidence by the prosecution, to prove the identity of the prisoner; and the rest of the entry was adverted to by the Counsel for the prisoner without objection on the part of the prosecution. Under these circumstances I overruled the objection taken by Mr. Ribton, and received the whole entry in evidence, in order, by means of the signature thereto, to identify the prisoner as the person to whom a witness had already proved that he had paid the cheques. I ruled that the said entry might be read in evidence for that purpose only, and it was read to the jury accordingly.

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*J. Stuart Wortley,
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This case, which was part heard on the 21st *January* 1854, and which was sent back to the learned Recorder to be amended, was argued on the 28th *January* 1854 before JERVIS C. J., MAULE J., WIGHTMAN J., PLATT B., and WILLIAMS J.

Metcalfe for the prisoner. It is submitted that the entry in question amounts to a receipt, and cannot be used in evidence without first being stamped. If the entry amount to a receipt it cannot be used even for the purpose of identification of the prisoner In

(a) 1853.				
Nov. 1	<i>A. B. & Co.</i>	<i>John Doe.</i>	£17,000.	£12,000
" 2	<i>C. D. & Co.</i>	<i>Richard Roe.</i>	..	£100
" 3				
" 4				
" 5				
" 27	Patent Wadding Company.	<i>H. N. Overton</i>	..	£22 4 0
" 28				
" 29				14 6 0

The above is the form of entry in the books of *S. & Co.*, and which form was transmitted to the Judges by the learned Recorder, together with the amended case.

1854. *Spawforth v. Alexander* (2 Esp. 621), it was held that ^{OVERTON'S Case.} a party who, on payment of a bill, writes the word *settled* by way of receipt, is liable to an action of debt, *qui tam.*, on the 35 Geo. 3, c. 55, s. 7, for the penalty. It was contended for the defendant in that case that it was not a receipt within the meaning of the act, and it was said by Lord *Kenyon*, "It is not necessary to have a receipt given in any specific terms. It is sufficient if it purports to be a discharge, and is intended to operate as such." In the cases of *Matthewson v. Ross* (2 H. L. Cases, 286), and *Evans v. Protheroe* (Macnaug. & Gor. 319), the observations of Lord *Cottenham* and Lord *CAMPBELL* in their respective judgments are conclusive.

It is admitted that the signature might have been used to have proved the identification. In *Jardine v. Payne* (1 B. & Ad. 663), it was held that an un-stamped bill, or one improperly stamped, might be looked at for a collateral object, as was done in the case of *Gregory v. Fraser*, 3 Camp. 454. But in the present case the whole entry ought not to have been read to the jury. It is therefore submitted that this conviction was wrong.

Parry, for the Crown. It is conceded that the whole entry was read at the trial, but it was distinctly stated, that it was offered for the mere purpose of identification.

JERVIS C. J.—Then it falls within the doctrine of Lord *CAMPBELL*, *Protheroe v. Evans*, cited by Mr. *Metcalfe*.

Parry. It is contended further, that if this be so, the document in question is not a receipt within the Stamp Laws.

JERVIS C. J.—But may it not be proved, by evidence *aliunde*, to be a receipt?

MAULE J.—There was a recent case decided by this Court, which shews that a paper may be shewn by

parol evidence to be an order for the payment of money, so as to support an indictment for the forging an order for the payment of money.

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Parry. There is such a case, *R. v. Snelling*, reported in *Dearsly's Crown Cases*, vol. 1, page 219. This document is a mere memorandum, similar to that in *R. v. Harvey* (R. & R. 227), and is not one acknowledging the receipt of money, but rather importing payment of money on an application for money.

JERVIS C. J.—There is the case of *R. v. Boardman*, 2 Moo. & Rob. 147.

PLATT B.—Is it more than a memorandum of the man's name receiving the money?

JERVIS C. J.—There is the case of *R. v. Hunter* (2 Leach, 624), where it was held that a document which did not purport to be a receipt on the face of it, was held capable of being brought within the statute by apt averments in the indictment.

Metcalfe replied.

JERVIS C. J.—This conviction is wrong. There are two points for consideration.

1st. Is the entry a receipt?

2nd. Is it, unstamped, capable of being given in evidence?

I think it a receipt, and therefore requires a stamp. *R. v. Hunter* shews that a document, containing a signature without more, may by apt averments be made to signify a receipt. In this case, the person receiving the money was required to sign the book, and evidence *aliunde* shews it to be a receipt. I think myself bound by *R. v. Hunter*, and that the document required a stamp; and, therefore, the entry could not be read for a purpose involving the receipt of money by the prisoner. To read the whole entry was wrong. The signature might have been used for

1854. proving the identity of the prisoner. The proper course then would have been to have asked the witness, whilst the book was lying before him on the witness-box, whether he paid the money to the party who signed that book, and to have proved that the signature was in the prisoner's handwriting. The proof would then have been the same as if he had left a knife behind him when he received the money, and would have been free from objection on account of the Stamp Laws.

MAULE J.—I think the conviction wrong. It is said the entry was used to prove the prisoner was in a certain place, whereas it only proves that he received the money. It is not used for a collateral purpose, but for one in which the receipt of money is involved. If you said the person I paid the money to wrote his name on a piece of paper, and another witness is called and looks at the paper, and says that it is the prisoner's handwriting, that would be right; but here the whole entry is read to the jury, which proves the payment to the prisoner, and it being un-stamped was clearly inadmissible.

WIGHTMAN J., PLATT B., and WILLIAMS J., concurred.

Conviction quashed.

See now 17 & 18 Vict Ch. 83 s. 27

REGINA v. HEWGILL.

1854.

AT the Epiphany Quarter Sessions for the county of Southampton, holden at Winchester on the 2nd January 1854, *H. F. Hewgill*, clerk, was indicted for obtaining the sum of 15*l.* under false pretences. The indictment was as follows :

" County of Southampton, to wit.] The jurors for our Lady the Queen, upon their oath, present that *Henry Frederic Hewgill*, late of the parish of *Titchfield* in the county aforesaid, clerk, on the 17th day of November 1853, was curate of *Crofton*, in the said parish of *Titchfield* in the county aforesaid, and being such curate on the day and year aforesaid, at the parish and county aforesaid, unlawfully and knowingly did falsely pretend to one *Thomas Waters* that he the said *Henry Frederic Hewgill* had received an order for the payment of money, to wit, the sum of 25*l.*, from one *Walter Maude Cosser* (he, the said *Walter Maude*

to the said *W. M. C.*, and that the defendant, after telling *T. W.* that he had received an order to go and receive his quarter's salary of *L.*, and that *L.* was very ill, and could not do it for him ; asked *T. W.* to let him have the money, and shewed a paper to this effect : " Received of *L.* the sum of 25*l.* for the Rev. *W. M. C.*'s note." *T. W.* gave him 15*l.*, and the defendant gave him the following receipt : " Received from *T. W.* 15*l.* on account of Rev. *W. M. C.*'s order for 25*l.*" *T. W.*, in his evidence, stated that he had no doubt the paper produced by the prisoner was genuine, and that he rested on that as much as on the other part of the transaction ; that it contributed to produce confidence, and that it was in consequence of what he saw, and what the prisoner said, and what the prisoner gave him that he was induced to let the prisoner have the money. *T. W.* also said that the defendant first told him that he had received a letter from *W. M. C.* that morning, wishing him to go to *L.* and draw his quarter's salary, and that that was part of the inducement to *T. W.* to let the prisoner have the money. The points left to the jury were, 1. Did the defendant make use of the pretence alleged in the indictment ? 2. Did *T. W.* part with his money in consequence of his belief in that pretence ? 3. Was that pretence false ? 4. Did the defendant obtain the money with intent to defraud ? The jury returned a verdict of Guilty.

Held. 1. That there was no variance between the pretence laid and the pretence proved. 2. That the actual substantial pretence on which *T. W.* parted from his money was the pretence of the order. 3. That the manner in which the case was left by the Court to the jury was right.

In an indictment for obtaining money under false pretences, the only pretence charged was that the defendant falsely pretended to one *T. W.* that he had received an order for payment of money from *W. M. C.* for the payment of a quarter's salary then due and owing to the defendant. It was proved that the defendant was curate

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Cosser, being then and there well known to the said *Thomas Waters*), as and for the payment of a quarter's salary then due and owing to the said *Henry Frederic Hewgill* in respect of the said curacy, and did then and there, by reason of the said false pretence, unlawfully obtain and have from the said *Thomas Waters* the sum of 15*l.* of lawful moneys of the realm of the goods, chattels, and moneys of the said *Thomas Waters*, with intent then and there to defraud : whereas in truth and fact, as the said *Henry Frederic Hewgill* then and there well knew, the said sum of 25*l.* was not then and there due and payable to him the said *Henry Frederic Hewgill* in respect of his said curacy, nor had the said *Walter Maude Cosser* given to him, the said *Henry Frederic Hewgill*, any order for the payment of the said sum of 25*l.* in respect of the said quarter's salary, nor for any sum, to the great loss and damage of the said *Thomas Walters*, and against the form of the statute in such case made and provided, and against the peace of our Lady the Queen, her crown, and dignity."

The evidence, so far as is material to the present case, was as follows :

Thomas Waters. I live at *Titchfield*. I am a grocer. I have known defendant for a period of fifteen months. He was clergyman at *Crofton*. Mr. *Cosser* is the vicar of *Titchfield*. On the 17th *November*, defendant came to my shop, and told me he had received an order that morning to go and receive his quarter's salary (25*l.*) of Mr. *Leighton*. That he had been there, and finding Mr. *Leighton* very ill in bed, he could not do it for him. He then asked me if I could oblige him with the money. I then went up-stairs, and on my return told him I could not do it. Before I went up stairs, he shewed me a paper, which I read and returned to him again. It was to this effect—"Received of Mr. *Leighton* the sum of 25*l.* for the Rev. W. M. *Cosser's*

note." It was in defendant's handwriting, and signed *Henry Hewgill*. Defendant then asked if I could oblige him with part. I said I would see. He said he wished to pay it away. I then fetched him 15*l.* He gave me a receipt, which I now produce. It was as follows:

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"*Titchfield, November 17, 1853.*

"Received from Mr. *Waters* the sum of 15*l.* on account of Rev. *W. M. Cosser*'s order for 25*l.*

"£15."

"*Henry Hewgill.*"

I gave him the money on account of my knowing Mr. *Cosser*, and I did not doubt defendant's word. He told me he had an order. I did not see it; but I believed his word. I have not been repaid.

Cross-examined. I have applied to Mr. *Cosser*, but I have never applied to Mr. *Hewgill* for the money. I told him if he would call again in an hour or two I would oblige him with the remainder of the money. I knew Mr. *Hewgill* before. I had no doubt the paper he produced was genuine. I acted on that as much as on the other part of the transaction. It contributed to produce confidence; and it was in consequence of what I saw, and what he said, and what he gave me, that I was induced to let him have the money. Without the receipt I should not have done it. *Crofton* is about a mile from *Titchfield*. I know Mr. *Leighton*. Defendant first told me he had received a letter from Mr. *Cosser* that morning. That was part of my inducement to let him have the money. He had the paper in his hand at the time, which he had taken to Mr. *Leighton*. He said the letter was wishing him to go to *Leighton* and draw his quarter's salary. That he had been to Mr. *Leighton*'s, and he was ill; so he came to me, and I might receive it from Mr. *Cosser*. I expected to receive the money from Mr.

1854. *Cosser.* I give the words which passed to the best of my recollection. It was a week or ten days before I repeated the conversation to any one. Mr. *Hewgill* had been in my shop before. I am sure he used the word *letter*. He said he had received a *letter* from Mr. *Cosser* that morning, wishing him to go to Mr. *Leighton* to receive his quarter's salary. Finding Mr. *Leighton* was ill, he then came to me, and asked me if I would oblige him, and then he shewed me the receipt he had drawn for Mr. *Leighton*, which he had in his hand. He laid it on the counter and I read it. At the time I gave him the money he said he would give me a receipt, and did so. That, and what he said besides, was the security I was to have for it. I was not going to part with my money without having a receipt for it.

Re-examined. I did not tell him I should not part with my money without a receipt. Before I gave him the money he said he would give me a receipt. I parted with the money from knowing him and Mr. *Cosser*, and believing what he said. Had I known he had no order from Mr. *Cosser*, I should not have let him have the money.

Revd. *W. M. Cosser.* I am Vicar of *Titchfield*. Defendant was my curate, and resides in the chapelry of *Crofton*. His salary was 100*l.* a-year, payable quarterly on the 1st *January*, 1st *April*, 1st *July*, and 1st *October*. It was payable from me through three different sources, and was payable either by an order on one of these sources or by a cheque on my own banker. The salary was paid up to the 1st *October*, and no more was due till the 1st of *January*. I had given him no order on the 17th of *November* to go to Mr. *Leighton* for his salary. I had not written to him on the subject. I had received no application from

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him. Application has been made to me, on behalf of Mr. *Waters*, for payment of 15*l.* I have refused to pay it.

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Cross-examined. Every quarter an order was drawn by me on the Treasurers of the Additional Curates' Society, the Dean and Chapter of *Winchester*, and the Lessee of the Great Tithes paid the residue. I usually gave the orders to the defendant. I did so the last time of payment. Had it been payable between the quarters, the portion of salary which would have been due on the 17th *November* would have been 13*l.* 9*s.* Thirty shillings was due to him from me for occasional duty. I know Mr. *Leighton*. He sometimes cashed private cheques for me.

At the close of the case for the prosecution, objection was taken by the prisoner's Counsel that the indictment was not supported by the evidence. That there was a material variance between the pretence laid and the pretences proved. That the only false pretence alleged was that defendant had received an *order* for the payment of money from Mr. *Cosser*, purporting to be as and for the payment of a quarter's salary then due, and owing to him in respect of his curacy; whereas the proof was of the receipt of a letter wishing him to go to Mr. *Leighton* to receive his quarter's salary, and that beyond the pretence laid there were other things proved to have been essential parts of the prosecutor's inducement to part with his money (viz. the receipt drawn for Mr. *Leighton* and the receipt for 15*l.* given to prosecutor), and material parts of the pretences as proved, which were not stated at all as they ought to have been. They cited *R. v. Plestow*, 1 Camp. 494; *R. v. Cartwright*, R. & Ry. 106; *R. v. Perrott*, 2 M. & S. 390; *Bayley J., R. v. Wickham*, 10 Ad. & El. 34.

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But the Court being of opinion that the statement made by defendant that he had received a *letter* wishing him to go to Mr. *Leighton* to receive his quarter's salary, was not a variance from the pretence that he had received an *order for the payment of money*; nor a separate pretence, but either identical with it or a mere explanation how he was to get the pretended order cashed; that the receipt of Mr. *Leighton* operated merely to produce confidence in the pretended order, and that the receipt to prosecutor was only required by him as a security to satisfy Mr. *Cosser* that the money had been paid on his order, overruled the objection.

Four points were left to the jury.

1st. Did defendant make use of the pretence alleged in the indictment, *viz.*: That he had received an order for payment of 25*l.* from Mr. *Cosser* for a quarter's salary, then owing to him in respect of his curacy?

2nd. Did prosecutor (*Waters*) part with his money in consequence of his belief in that pretence?

3rd. Was it false?

4th. Did defendant obtain the money with intent to defraud?

The jury returned a verdict of "Guilty."

The Court was then requested by defendant's Counsel to put the following question to the jury,—

"Was the money obtained as well by the production of the paper, which had been drawn up for *Leighton*, and the giving a receipt for the money and the other circumstances proved, as by the statement of an order received from Mr. *Cosser*, or by the statement that he had received an order from Mr. *Cosser* only," which as involving the points already overruled, the Court declined to do.

Defendant was sentenced to six months' imprisonment, and is now undergoing his sentence.

Defendant's Counsel having demanded a case for the judgment of criminal appeal, the above is submitted for the opinion of the Court.

If the Court shall be of opinion that the ruling of the Court of Quarter Sessions on the objection taken, and the direction to the jury in conformity therewith was right, the judgment will be confirmed, if not it will be reversed.

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F. R. Thresher,
Chairman.

This case was argued on 11th February 1854, before JERVIS C. J., MAULE J., WIGHTMAN J., PLATT B., and WILLIAMS J.

No Counsel appeared for the Crown.

C. Saunders (with him *Poulden*) for the prisoner. The indictment is not supported by the evidence. There is a material variance between the pretence laid and the pretence proved. The decided cases (*a*) shew that in an indictment for obtaining money by false pretences, the pretences must be distinctly set out, and that at the trial they must be proved as laid. In this indictment one false pretence only is alleged—namely, that the prisoner had received an order for payment of his salary then due and owing in respect of his curacy. No order for payment of money is proved.

WIGHTMAN J.—If an order had been proved it would not have been a false pretence.

Saunders. It was not proved that the prisoner pretended that he had received an order. The proof

(*a*) The cases cited were those referred to in the case reserved, and also *R. v. Thorn, C. & M.* 206.

1854. was of the receipt of a letter, wishing him to go to Mr. *Leighton* to receive his quarter's salary.

HEWGILL'S Case. JERVIS C. J.—Is not that letter an order? Unless you can say that it is not an order there is nothing in it.

Saunders. It might well be that the defendant had received such a letter as he said he had; and if so, that letter would not have been an order. In *Rex v. Plestow* (1 Campb. 494), the pretence charged was that he, the prisoner, had paid a sum of money into the Bank of *England*; but the evidence was that the prisoner said generally that the money had been paid into the Bank of *England*, and that was held to be a fatal variance.

MAULE J.—There the assertion that an individual had paid in the money was not proved; but what assertion is laid here which is not proved?

Saunders. The evidence of the witness *Waters* shews that he did not part with the money solely on the grounds alleged in the indictment.

JERVIS C. J.—We are asked whether the ruling of the Court and the direction to the jury were right; and our answer is that they were right. Because it came out on cross-examination that the defendant said that he had received a letter, therefore it seems to be contended that he did not say that he had received an order, and that there is a variance between the pretence laid and the pretence proved. I do not think there is any variance. The objection was that it was not proved that the prisoner pretended that he had received an order for money then due and payable; but what can be the meaning of saying that he had received an order for a quarter's salary, but that it was due and payable? Another objection is, that part of the inducement to the prosecutor to part with his money, was the receipt, and that that inducement is

not averred in the indictment ; but the actual substantial pretence was that he had received the order ; the order, and not the receipt, was the main inducement upon which the money was parted from. The pretence was found by the jury, and correctly found. The ruling and direction were right, the verdict was right, and the objections were wrong.

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The rest of the Court concurred.

Conviction affirmed.

REGINA v. ABRAHAM GREEN.

1854.

At the Quarter Sessions for the county of *Cambridge*, holden on the 3rd day of *January* 1854, *Abraham Green* was indicted for stealing, on the 10th day of *September* last, certain moneys of and belonging to his master, *Alexander Cotton, Esq.*

The prisoner was bailiff to the prosecutor, and it was part of his duty to receive and make payments on behalf of the prosecutor. An account of these receipts and payments was kept in a book in the prisoner's custody, which was examined by the prosecutor at irregular intervals. An examination was made on the

day of *July* last, and another on the day of *December* last, and the account comprised within these dates, among many items, the following payments, *viz.—*

shewed a balance in his favour of *2l.*, by taking credit for payments falsely entered in the book as having been made by him, when in fact they had not been made by him, and that the prisoner received from his master the sum of *2l.* as a balance due to him. Prisoner was convicted.

Held, that the conviction was wrong.

G. was indicted for larceny. The evidence shewed that he was the prosecutor's servant ; that it was his duty to receive and pay moneys for the prosecutor, and make entries of such receipts and payments in a book which was examined by the prosecutor from time to time ; that the prisoner, on one occa-

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Case." 1853, *August* 13.

<i>James Ludkin</i>	.	.	.	£1	8	0
<i>Samuel Pryke</i>	.	.	.	1	8	0
<i>John Brown</i>	.	.	.	1	8	0"

and twelve other names against which stood the same amount.

There was a series of similar items under dates of the 20th and 27th of *August*, and the 3rd, 10th, and 17th of *September*; and on the 17th of *September* this series of payments:—

<i>" James Ludkin</i>	-	-	15s. 0d.
<i>Samuel Pryke</i>	-	-	15s. 0d."

and thirteen other names against which stood the same sum of 15s. 0d.

John Brown proved that he was engaged by the prisoner to work for the prosecutor during the last harvest. The rate of wages was not named, but the witness knew that the other labourers were to receive 1*l.* 8*s.* a week, and he expected the same. The prisoner paid him 1*l.* on each of the following days, *viz.*, the 13th, 20th, and 27th of *August* last, and on the 3rd and 10th of *September* last.

The witness complained on the 20th and 27th of *August*, of receiving no more than 1*l.*, and about ten days after the 10th of *September*, the prisoner paid him 1*l.* in addition, making his wages 1*l.* 4*s.* a week during the five weeks.

James Ludkin proved that he was engaged by the prisoner to work for the prosecutor during the harvest, and that he received 1*l.* 8*s.* on each of the following days, *viz.*, the 13th, 20th, and 27th of *August*, and on the 3rd and 10th of *September*. On the 17th *September*, the prisoner paid him 11*s.* 6*d.*, and on his complaining that he did not pay him 15*s.*, the sum he paid the other labourers, the prisoner said it was because he was working in the barn.

Samuel Pryke gave similar evidence.

Each side of the account, which extended from the day of *July* to the 3rd day of *December* last, contained numerous items, amongst which were payments made for the purchase of goods by the prisoner on account of the prosecutor.

By one of these items the prisoner gave the prosecutor credit for $1l. 5s.$, which, it was stated by his Counsel, though no proof offered of it, he had not in fact received. There was no entry in the book in the handwriting of the prisoner.

The prisoner was present during all the time the prosecutor was examining the account, and signed his name to it on the prosecutor doing so ; but his attention was not called to any particular item. There was on the account a balance of $2l.$ due to the prisoner, which the prosecutor paid him.

At the conclusion of the evidence for the prosecution, the prisoner's Counsel contended, on the authority of *The Queen v. Chapman*, that the offence charged was neither larceny nor embezzlement, and submitted to the Court that on these facts the Court should direct an acquittal.

The Chairman directed the jury that the deduction of the five several sums of $4s.$ from the five weekly sums of $1l. 8s.$, to be paid to *Brown*, and of the several sums of $3s. 6d.$ from the weekly sums of $15s.$, to be paid respectively to *Ludkin* and *Pryke*, amounted to larceny, and told the jury that by a recent act they were enabled to return a verdict of either larceny or embezzlement, as their minds might be directed by the evidence ; on which the jury found a verdict of Guilty, whereupon judgment was postponed, and the prisoner discharged on bail to appear and receive judgment at the next Quarter Sessions for this county. The opinion of the Judges is asked whether the jury

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1854. could on these facts properly convict the prisoner of
GREEN'S larceny.

Eliot Thos. Yorke,

Chairman Q. S.

This case was argued on the 11th day of *February* 1854, before JERVIS C. J., MAULE J., WIGHTMAN J., WILLIAMS J., and PLATT B.

Tozer for the prisoner. There was no evidence of larceny or embezzlement. There was no evidence that he received any money from his master except the \$1.

MAULE J. For ought that appears, the payments may all have been out of his own money.

WILLIAMS J. The prisoner falsified the account, but the question is, was he guilty of larceny?

WIGHTMAN J. The evidence is, he entered money as paid which he had not paid.

JERVIS C. J. And that he did so for the purpose of obtaining thereby a portion of the sum of 2*l.* We are all of opinion that the offence of which the prisoner was guilty was not larceny, whatever else it may have been.

Conviction quashed.

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REGINA *v.* WATTS.

REGISTRATION NO. WHITING
4 Cos Cr Cas 336

To the Justices of either Bench and the Barons of the Exchequer, sitting for the consideration of Crown cases reserved under the 11 & 12 Vict., c. 78. The opinion of the Court is requested on the following case :

W. was indicted for stealing a piece of paper which the evidence proved was a written agreement,

but unstamped, to build certain cottages, and it was proved that work was still going on under the agreement at the time it was taken.

Held (PARKE B. dissentiente), that this being a chose in action was not the subject of larceny.

The prisoner, *William Mote Watts*, was indicted at the Quarter Sessions for the North Riding of *Yorkshire*, on the 28th *June* 1853, for stealing, on the 3rd of *May* 1853, "a piece of paper, the property of the prosecutor, *Francis Pattison*," and was convicted.

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The piece of paper found to have been stolen had written upon it, when taken by the prisoner as alleged in the indictment, an agreement between the prosecutor and the prisoner, signed by each of them. The agreement could not be produced, but secondary evidence of it was received, from which it appeared that the prisoner contracted thereby to build two cottages for the prosecutor for a sum specified, according to certain plans and specifications, and the latter agreed to pay two instalments, being part of the price agreed on, at certain stages of the work, and the remainder on completion; and it was stipulated that any alterations that might take place during the progress of the buildings should not affect the contract, but should be decided upon by the employer and employed previous to such alterations taking place.

Under this instrument the work was commenced and continued.

At the time when it was stolen by the prisoner, as alleged, the work was going on under it, nevertheless it was proved at the trial that when the agreement was stolen the prisoner had been paid all the money which he was entitled to under it, although there was money owing to him for extras and alterations.

The agreement was unstamped.

The Counsel for the prisoner objected, at the close of the case for the prosecution, that from the evidence it was clear that at the time the piece of paper referred to in the indictment was taken by prisoner, it was in reality a subsisting valid agreement, and therefore not

1854. the subject of larceny (as a piece of paper only) at common law.

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Case. The question for the opinion of the Court is, whether, under the circumstances above stated, the prisoner could be lawfully convicted of feloniously stealing a piece of paper as charged in the indictment.

No judgment was passed on the prisoner, and he was discharged on recognizance of bail, to appear and receive judgment when required.

James Pulleine,
Chairman.

The foregoing case having been ordered to be amended, so as to disclose whether the agreement referred to therein required a stamp, and whether the same was available as an agreement without a stamp.

It is, therefore, now stated that the document in question being an agreement, the matter whereof was of the value of twenty pounds, or upwards, by law required a stamp, but that as between the parties thereto, it would be available as an agreement without a stamp, but no evidence was given at the trial on either point.

James Pulleine,
Chairman.

Case as Amended.

This case having been ordered to be amended so as to disclose whether the agreement referred to therein required a stamp, and whether the same was available as an agreement without a stamp.

It is, therefore, now stated that the document in question being an agreement, the matter whereof was of the value of twenty pounds, or upwards, by law required a stamp, but no evidence, was given upon the trial on either point.

James Pulleine, Chairman.

This case came on for argument on the 12th of November 1853, when it was sent back to the learned Chairman of Quarter Sessions for amendment. It again came on for argument on the 21st of January 1854, before JERVIS C. J., PARKE B., ALDERSON B., WIGHTMAN J., and WILLIAMS J.; and the learned Judges differing in opinion, it was by direction of the Court re-argued on the 4th of February 1854, before Lord CAMPBELL C. J., PARKE B., ALDERSON B., COLERIDGE J., MAULE J., WIGHTMAN J., CRESSWELL J., PLATT B., WILLIAMS J., MARTIN B., and CROMPTON J.

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Bliss Q. C. (with him *Simpson*) for the prisoner. It is submitted that the paper, the subject-matter of the charge in the indictment, was a chose in action, and so was not the subject of larceny. Supposing the document to have been stamped there would have been no difficulty in the case; and the question for the consideration of the Court is, whether the fact of it being unstamped makes any difference. It is submitted it does not. If the document had been stamped it would have been a chose in action, and so good evidence of the same. The agreement was tendered, not for the purpose of making it available as an agreement, but in order that the Court might see that it was an unstamped agreement, and so to form a conclusion as to the effect of other evidence. It is contended that, although unstamped, it was good evidence of what it really was—namely, an unstamped agreement. Though secondary evidence was given, substantially it was the same as if the agreement had been produced, the loss of it having been proved.

Lord CAMPBELL C. J.—There is no occasion to labour that.

Bliss. Supposing the Court to look at the document it ascertains the nature of the contract between

1854. the parties. *Reid v. Dear*, 7 B. & C. 261. An agreement unstamped is valuable as a chose in action, though a disability may arise at the time of trial if it be not stamped. Nevertheless, it remains a chose in action. It has been held that the giving up an unstamped agreement is a good consideration for a promise. *Haigh v. Brookes*, 10 A. & E. 309. There is a distinction between instruments void for want of a stamp, and instruments available as choses in action when duly stamped. *Jackson v. Warren*, 7 T. R. 121. *Mann v. Luck*, 10 B. & C. 877. *R. v. Bishop of Chester*, Stra. 824. *Lazarus v. Cowie*, 2 Q. B. 459. *Bradley v. Barnsley*, 14 M. & N. 873.

MAULE J.—Supposing a declaration on an agreement to which you plead no stamp, and there is a demurrer thereto, surely the plaintiff would recover.

Bliss. Yes, the document might be stamped, and for that reason the plea would be bad. Indeed that was the effect of *Lazarus v. Cowie*, and *Bradley v. Barnsley*. The case of *Brewer v. Palmer*, reported in *Espinasse*, 213, may be cited.

ALDERSON B.—Is not the true reason why a chose in action is not the subject of larceny this, because it is evidence of a right; and that you cannot steal a man's right?

Lord CAMPBELL C. J.—If it were evidence of a right at the time of the alleged larceny, *cadit questio*. The contention, however, of the other side is that it was not. When the agreement be reduced into writing you cannot give parol evidence of it. The only evidence would be the unstamped paper which would be inadmissible.

Price, for the Crown. It is submitted that this agreement was not a chose in action. Every thing had been paid that was due upon it. It resembled a

note which has been satisfied, and which then is not a valuable security.

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WIGHTMAN J.—If you look, you will see there was money owing for extras.

MARTIN B.—Suppose an action to be brought for not building according to the specifications?

CROMPTON J.—The work was going on.

MAULE J.—You say that there is no subsisting agreement, therefore no chose in action, therefore the paper is not incidental to a chose in action. In that view of the case, a lease for lives, after dropping of the lives, would be the subject of larceny.

Price. Upon the authority of *Jardine v. Payne*, (1 B. & Ad. 663) at Nisi Prius, the want of a stamp would render the paper not a chose in action. The Courts will not treat an unstamped agreement as an available security. The words valuable securities are used in the statute. Upon an indictment for stealing a valuable security, the mere production of the paper, without being stamped, would not prove the offence, and it makes no difference that it may be stamped upon the payment of a penalty. (*R. v. Hart*, 6 C. & P. 106. *Wysse's case*, 1 Moo. C. C. 216. *R. v. Perry*, 1 C. & K. 725.) Assuming this to be a chose in action, I should still submit that the prisoner was properly convicted for stealing a piece of paper, upon the authority of a case in the *Year Books*, 10 Ed. 4, 49th H. 6. P. S. 9, 10. 1 *Hale*, P. C. 513. The reason why choses in action are said not to be the subjects of larceny, may be, that choses in action cannot be valued, and under the old law felony could not be committed unless upon something of the value of twelve pence.

MAULE J.—Can there be larceny of title deeds?

Price. When they savour of the realty as in the case of a box of charters, perhaps not. In the case of

1854. *Rex v. Walker* (Ry. & Moo. 155), records are described in an indictment as parchments. In this case, the prosecutor proved the thing stolen as laid, namely, a piece of paper, and the evidence proved it to be nothing else.

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Lord CAMPBELL C. J.—I think that the prisoner could not, under the circumstances, be indicted for stealing a piece of paper. If the agreement had been stamped, it seems to be allowed, notwithstanding the ingenious argument of Mr. Price, that an indictment for stealing a piece of paper could not be supported ; because then it would be a chose in action, and by the common law, larceny cannot be committed of a chose in action. Strictly speaking, the instrument is certainly not a chose in action, but evidence of it, and the reason of the common law rule seems to be, that stealing the evidence of the right does not interfere with the right itself, *jus non in tabulis*. At all events, the common law is clear that for a chose in action, larceny cannot be supported ; and the Legislature has repeatedly recognised that rule by making special provision with regard to instruments, which are choses in action, and of which, but for those enactments, larceny could not be committed. As to this not being a chose in action, because all that was due had been paid upon it, it appears that the agreement is still executory, and might be used by either side to prove their right. Then comes the objection, as to its not being stamped ; but though it is not stamped, I am of opinion that it is an agreement. The distinction is between instruments, which without a stamp are wholly void, and those which may be rendered available at any moment by having a stamp impressed upon them. There are many cases in which an un-stamped agreement is considered evidence of a right. When the question arises at Nisi Prius, as soon as it

appears that the agreement was reduced into writing, parol evidence is excluded, because the written instrument is the proper evidence ; and *Bradley v. Barnsley*, (14 M. & W. 373), is strong to shew that the Court considers an unstamped agreement evidence of a right. To an action on an agreement a plea that it was not stamped is clearly bad ; for the agreement may be stamped even pending the trial, and may then be given in evidence, as the stamping reflects back to the period of the making of the instrument. I agree that we must look at the state of the instrument at the time of the larceny committed ; but it then had a potentiality of being rendered available, and it was evidence of an agreement ; it was therefore evidence of a chose in action, and not the subject of larceny.

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PARKE B.—I am of opinion that the conviction is right. There is no doubt that at common law larceny cannot be committed of any instrument which is the evidence of a chose in action ; but I think that when this instrument was stolen it was not evidence of a chose in action. Being unstamped it was not available either in law or in equity, and by the operation of the Stamp Act, and could not be used for the purpose of shewing a right. It was a piece of paper ; and I differ from Lord CAMPBELL, in thinking that the potentiality of converting a chattel into evidence of a chose of action is sufficient to prevent it from being the subject of larceny. Where a plaintiff is prevented from giving parol evidence of a written agreement, it is because he had the power of giving better evidence of it by getting the instrument stamped, and if he does not get it stamped, it is his own fault. If the instrument is lost and he cannot get it stamped, then he may give parol evidence of it. In the present case therefore I think that that which was stolen was merely a piece of paper capable of being converted, but not yet

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actually converted into a valid agreement or the evidence of an agreement; and it is solely as evidence of an agreement that the common law would prevent it from being the subject of larceny.

ALDERSON B.—I agree with Lord CAMPBELL that this was an agreement at the time it was stolen. If the writing only becomes an agreement at the time when it is stamped, how is it that you may declare upon an unstamped agreement? If the agreement only dates from the stamping, the cause of action does not arise until the time of stamping, and therefore subsequently to the declaration. This seems to prove that the thing has existence as an agreement, though without a stamp it is not admissible in evidence. The reason why title deeds and choses in action are not the subject of larceny, is because the parchment is evidence of the title to land, and the written paper is evidence of a right; and though the instrument is stolen, the right remains the same. It has, therefore, no existence in point of law as a piece of paper or parchment merely, but is part of the right or title; and the extent to which this is carried appears from the passage in Lord Coke, in which even the box containing the charters is treated as part of the title also.

COLERIDGE J.—I concur with Lord CAMPBELL and my Brother ALDERSON. It is admitted that if this agreement had been stamped, it would not have supported a charge of stealing a piece of paper, a higher character having been given to it, and its character as a piece of a paper having been thereby absorbed; and though unstamped, I think that is still the case. If the objection was taken at Nisi Prius the Judge would look at the paper to see what its character was; it would then appear to have written on it an agreement; and but for the Stamp

Act it would be the evidence, and the only evidence of the agreement; and even though rendered inadmissible by that act, it has the effect of excluding all parol evidence of that contract. It is true that it is not in a condition in which it can be effectually sued upon, but it is capable of being rendered complete as evidence by being stamped, and it would not acquire any new character by the stamping; it would still be the same evidence of a chose in action, rendered admissible in evidence by reason of the stamp. As soon as the instrument is signed it becomes an agreement, and it is only because the Stamp Laws interfere that it is prevented from being used in evidence. The point is extremely subtle; and one regrets that the fate of parties in a Court of justice should depend upon distinctions so nice, but upon the best consideration which I can give to the case, it seems to me that the conviction is wrong.

MAULE J.—I am of the same opinion. I think—indeed every body thinks—that this is an unstamped agreement; and if it is an agreement it is not the subject of larceny. When one speaks of a piece of paper as being an agreement, it means that the paper is evidence of a right, and as a right cannot be the subject of larceny, neither is the paper which is evidence of it.

WIGHTMAN J. and CRESSWELL J. concurred.

PLATT B.—I also am of the same opinion. If an action were brought upon this instrument, the declaration and all the pleadings would describe it as an agreement, and it becomes so in my opinion as soon as it is signed by both parties, though not available in evidence without the impression of a stamp. The mode of taking the objection at Nisi Prius proves the same thing. The witness is asked whether the agreement was not in writing; and when he

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answers, "Yes," and the instrument is produced, the Judge looks at it, and finding it to be an agreement, because upon no other ground could he do so, rejects it for want of a stamp. It would surely be strange to hold that it was no agreement until it was stamped, when the necessity for a stamp arises from its being an agreement. According to that argument, if the instrument is stamped the prisoner must be acquitted ; but if not stamped, convicted ; but it seems to me that that would be to bring a man within the reach of the criminal law by a side wind, and a degree of subtlety, consistent neither with law or justice.

WILLIAMS J., MARTIN B., and CROMPTON J., concurred.

Conviction reversed.

Ac 6 Cor 3/6

REGINA v. WILLIAM CARLISLE and
WILLIAM BROWN.

1854.

THE following case was stated by Mr. Justice CRESSWELL.

The defendants were tried before me at the last Liverpool assizes on the following indictment :—

Lancashire, to wit.] The jurors for our lady the Queen upon their oath present that before the time of the committing of the offences hereinafter mentioned, to wit, on the 23rd day of December, in the year of our Lord, 1853, one *Thomas Sibson* sold to *William Brown* a certain mare at and for the price, to wit, of 39*l.*, to be paid for the said mare by the said *William Brown* to the said *Thomas Sibson*, which said price, at the time of the committing of the offences herein-after mentioned was still due and unpaid, and the jurors aforesaid, upon their oath aforesaid, do further present that *William Carlisle* and the said *William Brown*, well knowing all and several the premises, but contriving and intending to cheat and defraud the said *Thomas Sibson*, did, on the day and year aforesaid, unlawfully conspire, combine, confederate, and agree together, by false and fraudulent representations to the said *Thomas Sibson* that the said mare

Indictment alleged that *S.* sold *B.* a mare for 39*l.*; that while the price was unpaid, *B.* and *C.* conspired by false and fraudulent representations to *S.* that the mare was unsound and that *B.* had sold her for 27*l.*, to induce *S.* to accept a less sum of money in payment for the said mare than *B.* had agreed to pay *S.* for the same, and thereby to defraud *S.* of 12*l.* of the price. It was proved in evidence that *S.* had sold the mare to *B.* as alleged, and

had agreed to trust him for the price. That *B.* afterwards, together with *C.*, falsely represented to *S.* that the mare was unsound of her wind, and that she had been examined by a veterinary surgeon, who had pronounced her a roarer. *B.* afterwards told *S.* that in consequence of the unsoundness he had sold the mare for 27*l.* only (which was false), and persuaded *S.* to receive that sum in satisfaction of his claim, but no receipt or other discharge was given. Held, that, although the acceptance of the 27*l.* could not be pleaded in satisfaction of the larger sum, the indictment was sustainable, and that the facts proved in evidence did sustain it.

1854. was unsound of her wind, and that she had been examined by a veterinary surgeon, who had pronounced her a roarer, and that he, the said *William Brown*, had sold her for 27*l.*, to induce and persuade the said *Thomas Sibson* to accept and receive from the said *William Brown* a much less sum of money in payment for the said mare than the said *William Brown* had agreed to pay the said *Thomas Sibson* for the same, and thereby to cheat and defraud the said *Thomas Sibson* of a large part, to wit, 12*l.* of the price so agreed by the said *William Brown*, to be paid to the said *Thomas Sibson* for the said mare, to the great damage of the said *Thomas Sibson*, and against the peace of our lady the Queen."

It was proved, as alleged, that *Thomas Sibson* had sold a mare to *Brown*, that *Brown* stated that he was about to take her to *Preston* fair, and *Sibson* agreed to trust him for the price till after the fair. The defendants afterwards conspired to send a false account of the mare to *Sibson*, and thereby to get him to forego part of the agreed price, and in pursuance of the conspiracy *Carlisle* wrote and sent the following letter to *Sibson* (a).

"*Preston, Jay 2th, 54.*

"*Mr. Simpson,*
Sir,

The Mare I Bought From You is unsound of hir Wind She as been examined By a Veterinary Surgeon and he as pronounced hir a roar. On account of hir being Slope when I Bought hir I could not examming hir as to her Wind. I nough request an answer by return of post what must be don with

(a) This letter was set out in the case, and is here set out *verbatim et literatim*.—H. R. D.

hir. I could have sold the Mare well head it not been
for that Defect.

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N.B. Direct to *William Brown*

White Horse Inn

Preston

I am yours respectfully

Wm. Brown."

Address of Envelope

"*Mr. Sibson*

Grinsdal By Carlisle in hast."

In consequence of the letter *Sibson* went to *Preston* and saw *Carlisle*, who stated that he had examined the mare, and that she was unsound, which he knew to be false. *Sibson* afterwards saw *Brown*, who told him that he had sold the mare for 27*l.* only, (which was false), and persuaded *Sibson* to receive that sum in satisfaction of his claim, but no receipt or other discharge was given. For the defendants it was contended that no indictable offence had been proved or charged, for that the facts alleged in the indictment, and given in evidence, did not, and could not, alter the position of *Sibson*, inasmuch as the payment of the smaller sum was no satisfaction of the larger sum for which he had sold the mare to *Brown*, and consequently he might afterwards enforce payment of the residue, and could not be thereby cheated of the difference. The jury found the defendants guilty, but, having doubts upon the point raised, I discharged them on bail, and request the opinion of this Court as to the legality of the conviction.

C. CRESSWELL.

On 29th April, 1854, this case was argued before POLLOCK C. B., PARKE B., CRESSWELL J., ERLE J., and CROMPTON J.

No Counsel appeared for the Crown.

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Whigham, for the prisoners. There really is no offence whatever charged in this indictment, or proved by the evidence given at the trial. In order to constitute a conspiracy there must be either a combination to effect some illegal object, by lawful means, or by illegal means to effect a lawful or unlawful object. The indictment in this case alleges that the prisoners did unlawfully "conspire, &c., by false and fraudulent representations to the said *Thomas Sibson*, that the said mare was unsound of her wind, and that she had been examined by a veterinary surgeon, who had pronounced her a roarer; and that he the said *William Brown* had sold her for 27*l.*; to induce and persuade the said *Thomas Sibson* to accept and receive from the said *William Brown* a much less sum of money in payment for the said mare than the said *William Brown* had agreed to pay the said *Thomas Sibson* for the same." Thus the object alleged is to persuade *Sibson* to accept 27*l.* in discharge of 39*l.* The words at the end of the indictment, "and thereby to cheat and defraud the said *Thomas Sibson* of a large part, to wit 12*l.*, of the price so agreed by the said *William Brown* to be paid to the said *Thomas Sibson* for the said mare," are merely a conclusion drawn by the pleader, and not properly drawn, inasmuch as that could not be the effect of the transaction. The case of *Cumber v. Wayne*, 1 Smith's L. C. 146, was cited at the trial, and is conclusive to shew that a creditor cannot bind himself by a simple agreement to accept a smaller sum in lieu of an ascertained debt of a larger amount. I contend, on the authority of this decision which is recognised law, and on the facts of this case, that the indictment, in thus alleging the object of the conspiracy, is in fact charging the prisoners with intending to effect a thing which could not be; for, notwithstanding the receipt of a lesser

sum, the debt due to *Sibson* remained in law precisely the same as if no representations had been made by the prisoners.

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POLLOCK C. B.—As to the proposition contained in *Cumber v. Wayne*, there can be no question: but suppose a release by deed under seal was given, would not that be valid?

Whigham. There was no release in this case, nor was there any attempt to procure one charged or proved.

ERLE J.—Suppose persons were to conspire, by false representations, to obtain a gift?

PARKE B.—Yes. But that would be inducing a man to part with his property in such a way that when he had once done it he could not get it back again.

POLLOCK C. B.—I do not see the force of the argument, that what has been done is not indictable, because it did not effect the object.

ERLE J.—It is an indictable offence to conspire by unlawful means to accomplish a lawful object. There are abundance of authorities to support that proposition; and are not the false representations in the present case the unlawful means?

Whigham. It is submitted that in the present case there is nothing more than an attempt, by a purchaser, to obtain an abatement of price, by a representation that he has made a bad bargain. The mare was, in fact, sold by the prisoner *Brown* for 32*l.*, so that he had actually sustained a loss by the transaction; and the only false representation was, that the loss was larger than it really was.

CROMPTON J.—I am not aware that there is any case which goes so far as expressly to decide that a conspiracy to misrepresent the value of goods, as between buyer and seller, would not be an indictable offence. Suppose, in the present case, the purchase

- 1854.** money for the mare had been paid, and this was
CARLISLE'S Case. a conspiracy to get it back ?

Whigham. That would be a fresh transaction. Here the object never could be effected, and therefore it is a conspiracy to do something which is legally impossible.

POLLOCK C. B.—Would not the same remark apply to all cases where there is fraud ? Fraud vitiates the transaction, and in that sense nothing can be legally effected.

CRESSWELL J.—Suppose a person sends goods to a commission agent, and it is falsely pretended that the goods produced a certain sum, when, in fact, they produced a great deal more.

ERLE J.—In the case of *Regina v. Kenrick*, 5 Q. B. Rep. 49, it was held, that an indictment for conspiracy was sustained by proof that two persons conspired to make a representation, knowing it to be false, that certain horses were the property of a private person and not of a horse dealer, thereby inducing a third person to buy them.

Whigham. The present case is more like the case of *Rex v. Pywell*, 1 Stark. N. P. C. 402, in which it was held that an indictment will not lie for a conspiracy to cheat and defraud by selling an unsound horse.

ERLE J.—I was Counsel in *Regina v. Kenrick*. The case of *Rex v. Pywell* was the foundation of the argument in favour of the prisoner in that case, and I very much relied upon it ; but the learned Judges did not sanction its authority (*a*).

(a) In *R. v. Rowlands*, 2 Den. C. C. R. 386, ERLE J. says, that the decision in *Rex v. Pywell and others* was overruled by *R. v. Kenrick*. Lord Denman, in delivering the considered judgment of the Court in *R. v. Kenrick*, 5 Q. B. 62,

says : In *Rex v. Pywell* the acquittal was directed, not because an action might have been brought on the warranty, but because one of the two defendants, though acting in the sale, was not shewn to have been aware that a fraud was prac-

Whigham. The case of *Rex v. Turner and Others*, 13 East, 228 (a), bears upon this point. In that case it was held that an indictment would not lie for a conspiracy to commit a civil trespass, by agreeing to go into a preserve for hares, the property of another, for the purpose of snaring them, though alleged to have been done in the night by the defendants armed with offensive weapons for the purpose of opposing resistance to any attempt to apprehend or obstruct them; and in that case Lord *Ellenborough* C. J. says, "I should be sorry that the cases of conspiracy against individuals, which have gone far enough, should be pushed still further."

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POLLOCK C. B.—We are of opinion that this indictment is sustainable and that the facts given in evidence do sustain it. The substance of the charge is that the defendants conspired to use unlawful means, namely false representations, to induce the prosecutor to forego a part of his claim; and I cannot see the force of the argument, that, because the prisoners did not by means of their false representations alter the right of the prosecutor to his full claim, the indictment is not sustainable, since in no case where a change is made in the possession of a chattel through a fraud is the property altered. It is not necessary that the fraud should be successful. The offence here charged and proved comes within the legal definition of a conspiracy and the defendants must take the consequence.

The other learned Judges concurred.

Conviction affirmed.

tised. Lord *Ellenborough* said, that "no indictment in a case like this could be maintained without evidence of concert between the parties to effectuate a fraud."

(a) This case is overruled by *Regina v. Rowlands*, 2 Den. C. C. R. 388. See also *R. v. Kenrick*, 5 Q. B. 62.

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REGINA, on the prosecution of the Inhabitants
of the County of WORCESTER, *against* THOMAS
HARRIS.

H. was tried and convicted at the sessions for the county of *W.* on an indictment charging him with embezzling certain moneys as servant to the inhabitants of that

county. It appeared that *H.* was the miller of a mill in the gaol of the county, that the offence, if any, took place entirely within the gaol, which is situate within the county of the city of *W.*, more than 500 yards from the county of *W.*, and that the county of the city of *W.* has a separate jurisdiction and its own Recorder and Quarter Sessions. It was the duty of *H.* to direct persons bringing grain to be ground at the mill to obtain at the porter's lodge a ticket, specifying the quantity of grain brought. The ticket was his order for receiving the grain, and it was his duty to receive the grain with the ticket, to grind it, to receive the money for the grinding, and to account for the money to the governor of the gaol, who accounted to the county treasurer. *H.* had no right to grind any grain at the mill for his private benefit, nor without a ticket as above mentioned. *H.* was appointed to his situation by the magistrates of the county at a weekly salary, which was paid to him out of the county rates by the governor of the gaol, who received the money from the county treasurer. *H.* received and ground grain without a ticket, and without directing the persons bringing the grain to obtain one. He received the money for the grinding, and did not account for it to the governor of the gaol, but applied it to his own use. *Held*, that *H.* could not be convicted of embezzlement, as the conclusion to be drawn from the facts was, that he had made an improper use of the mill by grinding the corn for his own benefit, and consequently that he did not receive the money for or on account of his masters.

Quære, whether the Court of Quarter Sessions had jurisdiction to try the case?

Quære, whether *H.* was rightly charged as servant of the inhabitants of the county?

Sembie, per CRESSWELL J., that after verdict this Court has no power to amend a count so as to make a jury party to the finding.

money. There were other counts in which he was described as servant to the clerk of the peace for the county of *Worcester* and others. He was found guilty and sentenced to twelve months' imprisonment, but execution was respite until the opinion of her Majesty's Justices and Barons could be obtained upon the following case.

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Harris was the miller of a mill in the gaol of the county of *Worcester*. It was the duty of the prisoner to direct any person bringing grain to be ground at the mill to obtain at the porter's lodge at the gaol a ticket specifying the quantity of grain brought. The ticket was his order for receiving the grain. It was then the duty of the prisoner to receive the grain with the ticket, to grind the grain at the mill, to receive the money for the grinding from the person so bringing the grain with the ticket and to account to the governor of the gaol for the money so received. The governor accounted for the same to Sir *Edmund Lechmere*, the treasurer of the county rates. It was a breach of the prisoner's duty to receive or grind grain without such a ticket as above mentioned, but he had no right to grind any grain at the mill for his private benefit. The prisoner was appointed to his situation by the magistrates of the county of *Worcester*, myself and others, at a fixed weekly salary which was paid to him out of the county rates by the governor of the gaol who received the money for that purpose from Sir *Edmund Lechmere*. The monies which the prisoner misappropriated he received from persons for grinding their grain at the mill, but none of these persons had obtained a ticket as above mentioned from the porter's lodge, nor had they been directed by the prisoner to obtain such ticket, nor was there in fact any ticket at all. The offence, if any, took place entirely in the gaol for the county of *Worcester*, which is situate within

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the county of the city of Worcester, more than five hundred yards from the county of Worcester. The county of the city of Worcester has a separate jurisdiction and its own Recorder and Quarter Sessions.

It was objected on the part of the prisoner that the Court of Quarter Sessions for the county had no jurisdiction to try the case ; that the prisoner was not a servant within the meaning of the Embezzlement Statutes to either the inhabitants of the county or to the clerk of the peace and others ; that the money he received he did not receive by virtue of his employment, nor for or on account of his masters, so as to constitute the offence of embezzlement.

It was agreed that any amendment in the indictment which the facts in evidence might warrant, and which the Court of Quarter Sessions had the power of making, should be considered by the Court of Criminal Appeal as made. I have to request the opinion of the Court of Criminal Appeal whether the conviction can be supported ?

John S. Pakington, Chairman.

This case was argued on 29th April 1854, before POLLOCK C. B., PARKE B., CRESSWELL J., ERLE J., and CROMPTON J.

Huddleston appeared for the prisoner, but the Court called upon

Selfe, (who appeared for the Crown), to support the conviction.

PARKE B.—What do you say as to the venue ?

Selfe. That depends upon the construction which your Lordships may put on the 48th section of 4 Geo. 4, c. 64(a). The words of that section are as large as

(a) This section enacts “That every gaol, house of correction, or other prison, for any county, riding or division, county of a city or county of a town, or for any town, liberty, soke or place, not being a

they can be. I can suggest no argument upon them, but I submit that they are full, clear, and precise.

The second objection is, that the prisoner was not a servant, within the meaning of the Embezzlement Statutes, either to the inhabitants of the county, or to the clerk of the peace and others. The statute 7 Geo. 4, c. 64, s. 15, provides that property belonging to counties, &c., may in indictments be stated to belong to the inhabitants of such county, &c., and that it shall not be necessary to specify the names of any of such inhabitants. But if any difficulty should arise on this point, the case provides that any amendment in the indictment which the facts in evidence warrant, and which the Court below had the power of making, shall be considered by this Court as made.

CRESSWELL J.—But can you alter an indictment after the verdict is found, and so make the jury a party to the finding ?

county, but having an exclusive jurisdiction for the trial of felonies or misdemeanors committed therein, which is now built, or shall hereafter be built, together with the ground whereon the same shall stand, and every court, yard, building and appurtenance thereunto belonging, with every addition that shall hereafter be made thereto, which said gaol, house of correction or other prison, court, yard, building, appurtenance or addition, is, or shall be situate within the limits of any other county, riding, or division, county of a city, county of a town, or of any other town, liberty, soke or place, not being a county, but having an exclusive jurisdiction for the trial of felonies or misdemeanors committed therein, shall be deemed and taken to be part of the county riding or division, county of a city, county

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of a town, or of the town, liberty, soke or place for which the same shall be used as a gaol, house of correction or other prison, so long as the same shall be so used and no longer ; and the justices of the peace, mayors, jurats, coroners, constables and other officers of such county, riding or division, county of a city, county of a town, or of such town, liberty, soke or place, for which the same shall be used as a gaol, house of correction or other prison, shall, during the time that the same shall be so used, have as full power and authority therein as they would have if the same was not situate within the limits of such other county, riding or division, county of a city, county of a town, or of such town, liberty, soke or place ; any charter, law, or usage to the contrary thereof in anywise notwithstanding."

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Selfe. It is submitted that the prisoner is properly charged to be the servant of the inhabitants of the county. In *R. v. Callahan*, 8 C. & P. 154, on an indictment for embezzlement, a collector of poor and other rates in the parish of Saint Paul, *Covent Garden*, was held to be rightly described under the Act 10 Geo. 4, c. 68, as servant to the committee of management of the affairs of that parish, though he was elected by the vestrymen of the parish. So here, although the prisoner was appointed to his situation by the magistrates of the county, he is, in fact, the servant of the inhabitants who pay his salary, by the hand of the treasurer, out of the county rate. The money he received for grinding corn it was his duty to pay over to the governor of the gaol, whose duty it then became to pay it to the treasurer for the benefit of the inhabitants. A slighter employment than this would make him the servant of the inhabitants. In *R. v. Spencer*, R. & R. 299, it is said that a man is sufficiently a servant within the 39 Geo. 3, c. 85, although only occasionally employed when he has nothing else to do; and that it is sufficient if he was employed to receive the money which he embezzled, though receiving the money was not within his usual employment, and although it was the only instance in which he was so employed.

POLLOCK C. B.—Here the prisoner was appointed by one set of persons to do duty for another set of persons, and was paid by a third.

Selfe. The inhabitants, as ratepayers, do really pay, although the hand by which the money is paid is that of the treasurer. In *R. v. Jenson*, 1 Moo. C. C. 434, it was held that a clerk of a savings bank was properly described as clerk to the trustees, though elected by the managers. Here the county justices are the managers of the gaol, and they appoint the

prisoner; but he may, nevertheless, be well held to be the servant of the inhabitants by whom he is in fact paid.

CRESSWELL J.—The magistrates appoint the prisoner, and they alone can discharge him. The inhabitants have neither the power to appoint him, the power to fix his salary, nor the power to dismiss him.

Selfe. The justices act as the agents of the inhabitants in making the appointment; but if your Lordships shall think that the facts do not make the prisoner the servant of the inhabitants, the counts might be altered so as to make him the servant of the treasurer or the servant of the justices.

I now come to the third objection, that the prisoner did not receive the money by virtue of his employment, nor for or on account of his masters, so as to constitute the offence of embezzlement,—it being contended on the trial by the learned Counsel for the prisoner, that the money was not received by virtue of the employment, because the prisoner had neglected to require the persons who brought the grain to obtain a ticket specifying the quantity of grain brought, and that that being his duty, and he neglecting the performance of it, he was not acting within the scope of his employment. The answer to this objection is, that he was employed as a miller for his masters, to grind the corn brought to be ground by strangers, and he fully performed that duty in every respect, except in directing the parties to get a ticket from the porter.

PARKE B.—The proper question is, whether the omission to require a ticket was a mere neglect of duty, or whether it shewed an intention on his part to use the mill on his own account, and not for his employers.

Selfe. Surely such an omission cannot discharge him from the liability to account for the money; that

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1854. would be to allow the prisoner to exonerate himself from responsibility to his employers for one breach of duty, because, by neglecting to procure a ticket, he committed another breach of duty. He had no right to grind any corn for his own benefit, and it is submitted that, although when he received the grain he neglected to require the ticket, still the corn must be taken to be ground for his employers.

CRESSWELL J.—The case finds that a ticket was the prisoner's order for receiving the grain. He ought not to have received the grain unless he got a ticket, nor had he any power to make his masters responsible for any flour as to which he did not receive a ticket.

Selfe. There is not a suggestion that the persons who brought the grain knew anything about the ticket, and I apprehend that the masters would be responsible. The receipt of the ticket by the prisoner was merely a matter of private arrangement between the master and the servant; and I submit that if grain was brought to be ground, and the servant received it without a ticket, the masters would be responsible. It is true that the duty of the prisoner to tell the persons who brought the grain to procure a ticket, was antecedent to his duty to receive the grain; but he ought not to escape from responsibility because he chooses to neglect part of his master's orders.

POLLOCK C. B.—That is strong evidence of bad conduct of some sort, and it may be of criminal conduct; but is it such as to constitute embezzlement? If a workman employed in a blacksmith's shop, who has engaged to give his master his whole services, is asked by some one to do for him a little work in the shop which only requires labour, and he does the work, and says to the man pay me 2d. for the job, and say nothing about it, the workman could not be indicted for embezzling the 2d., though he might be guilty of

a breach of his contract, which was to give his master his entire labour.

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Selfe. It is true that in the case of *Rex v. Snowley*, 4 C. & P. 390, which will be relied on by the other side, there seems some authority for holding that where a servant violates his master's orders in one respect, he may thereby free himself from the responsibility of the violation of them in another. There A. was employed to lead a stallion, and he was to charge 30s. per mare, and not take less than 20s. He received the sum of 6s. in one instance for which he did not account, and it was held not to be embezzlement, because the money was not received by virtue of his employment. But that doctrine seems to have been questioned by PATTESON J. in *R. v. Aston*, 2 C. & K. 413. There a brewer's drayman had orders to sell his master's beer at fixed prices only, and sold it at an under price, and he was held to be guilty of embezzlement. There was in that case the additional fact that, the master having heard of the sale at an under price, had, unknown to the prisoner, authorized the purchaser to pay the prisoner the amount; but PATTESON J., (after conferring with PARKE B.), said he had great doubts as to the authority of *R. v. Snowley*.

PARKE B.—Suppose the prisoner had sent to a friend and said, I will grind your corn at a cheaper rate than the regular price, the doing so would be a misuse of the power of his masters' mill; and if his misusing the mill was for his own benefit, how could it be said that he received the money by virtue of his employment? As at present advised, I think I was right in my decision in *R. v. Snowley*.

Selfe. Where a servant is in possession of his master's property, which he is to use for his master's profit, and he improperly uses it for his own benefit,

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and receives money for that use, it is submitted that he is guilty of embezzlement.

POLLOCK C. B.—We are all of opinion that this conviction cannot be sustained. But the only point on which we give our unanimous opinion is, that, upon the facts stated, it appears that the defendant had no right to receive and grind any corn on behalf of his masters, except such as was brought to him with a ticket. The reasonable conclusion to be drawn from his receiving and grinding the grain without a ticket is, that he intended to make an improper use of the machinery intrusted to him, by using it not for the benefit of his masters, but for the benefit of himself. We think, therefore, that the money which he received was not received on account of his masters, and that he cannot be said to be guilty of embezzlement.

The other learned Judges concurred.

Conviction quashed.

REGINA *v.* JOSEPH WHITEMAN and THOMAS 1854.
WHITEMAN.

THE following case was stated by the Chairman of the General Quarter Sessions for the West Riding of the County of *York* (a).

West Riding of *Yorkshire*. Be it remembered that, at the Spring General Quarter Sessions of the Peace of our Lady the Queen, holden at *Pontefract*, in and for the West Riding of the county of *York*, on *Monday*, the 3rd day of *April*, in the sixteenth year of the reign of our Sovereign Lady *Victoria*, by the Grace of God of the United Kingdom of *Great Britain* and *Ireland* Queen, Defender of the Faith, and in the year of our Lord one thousand eight hundred and fifty-four, before *William Battie Wrightson*, Esquire, chairman, *James Armitage Rhodes*, clerk, and others, their fellows, Justices of our said Lady the Queen, assigned to keep the said peace of our said Lady the Queen, in the said riding; and also

(a) For the reasons given by my learned predecessor, (see 1 Den. C. C. R. Preface, iv.), the cases in these Reports are printed in the precise words in which they are stated for the consideration of the

Judges; and I have not thought it right to depart from this general rule in the present instance, although much unnecessary matter has been imported into the case.

H. R. D.

evidence the jury found the prisoners guilty. Held, that the conviction was wrong, inasmuch as the injury exceeding 5*l.* must be actual injury to the trees, &c., and that proof of consequential injury was insufficient.

The prisoners were indicted under sect. 19 of the 7 & 8 Geo. 4, c. 30, (the Malicious Trespass Act), for having feloniously, unlawfully, and maliciously done damage to certain trees in a hedge, thereby doing injury to the owners to an amount exceeding 5*l.* The evidence shewed that the actual injury done to the trees was to the amount of 1*l.* only, but that it would be necessary to stub up the old hedge and replace it, the expense of which would be 4*l.* 14*s.* Upon this

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to hear and determine divers felonies, trespasses, and other misdemeanors, committed within the said riding, upon the oath of *John Dransfield, Richard Bayldon Guest, Henry Harvey, Joseph Hall, Peter Lightfoot, Henry Liversedge, Robert Latham, Henry Mann, Edward Stephen Nicholson, Thomas Teale Powell, Richard Pybus, John Birks Pigott, Thomas Simpson, William Wilks Smith, and Isaac Tyson*, good and lawful men of the said riding, then and there impanelled, sworn and charged to enquire between our Sovereign Lady the Queen and the body of the said riding, it is presented as follows, to wit:—“The jurors for our Lady the Queen, upon their oath present, that *Joseph Whiteman*, late of *Wakefield*, in the West Riding of the county of *York*, labourer, and *Thomas Whiteman*, late of the same place, labourer, on the 1st day of *March* in the 17th year of the reign of our Sovereign Lady *Victoria*, by the grace of God of the United Kingdom of *Great Britain and Ireland* Queen, Defender of the Faith, with force and arms, at the parish of *Rothwell*, in the West Riding of the county of *York*, two oak trees, one ash tree, one elm tree, and one hundred thorn shrubs, the property of *Joseph Charlesworth* and others, then and there growing in a certain hedge of the said *Joseph Charlesworth* and others there situate, (elsewhere than in a park, pleasure ground, garden, orchard, or avenue, or any ground adjoining or belonging to a dwelling-house), feloniously, unlawfully, and maliciously did damage, thereby then and there doing injury to the said *Joseph Charlesworth* and others to an amount exceeding the sum of *5l.*, to wit, to the amount of *5l. 14s.*, against the form of the statute in such case made and provided, and against the peace of our Lady the Queen, her crown and dignity. And the jurors aforesaid, upon their oath

aforesaid, do further present, that the said *Joseph Whiteman* and *Thomas Whiteman*, afterwards, to wit, on the said 1st day of *March*, in the year aforesaid, with force and arms at the parish aforesaid, in the riding aforesaid, parts of divers trees and shrubs, to wit, parts of two oak trees, one ash tree, one elm tree, and one hundred thorn shrubs, the property of the said *Joseph Charlesworth* and others, then and there growing in a certain hedge of the said *Joseph Charlesworth* and others, there situate, (elsewhere than in a certain park, pleasure ground, garden, orchard, or avenue, or any ground adjoining or belonging to a dwelling-house), feloniously, unlawfully, and maliciously did damage, thereby, then and there doing injury to the said *Joseph Charlesworth* and others, to an amount exceeding the sum of *5l.*, to wit, to the amount of *5l. 14s.*, against the form of the statute in such case made and provided, and against the peace of our said Lady the Queen, her Crown and Dignity. —*Elsley.*" At which same Sessions of the Peace, holden at *Pontefract* aforesaid, in and for the said riding, on the said *Monday* the 3rd day of *April* aforesaid, in the year aforesaid, before the justices aforesaid, the said *Joseph Whiteman* and *Thomas Whiteman*, in the custody of the keeper of the house of correction kept for the said riding, in their proper persons come, and having heard the said indictment read, say that they are not guilty of the premises in the said indictment alleged, and thereby put themselves upon the country. Whereupon the sheriff of the said county of *York* is commanded that he omit not, by reason of any liberty in his bailiwick, but that he cause a jury of twelve good and lawful men thereupon to come before the said justices, by whom the truth of the matter in question would be better known and who have no affinity to

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the said *Joseph Whiteman* and *Thomas Whiteman*, to recognize upon their oath whether the said *Joseph Whiteman* and *Thomas Whiteman* are guilty of the premises in the indictment aforesaid above specified, or not guilty. And the jurors of the said jury, by the said sheriff for this purpose impanelled and returned, to wit, *Edward Clough*, *Benjamin Wardingly*, *John Lee*, *John Wilton*, *Thomas Ross*, *George Pickering*, *Joseph Plant*, *John Bramald*, *Charles Shackleton*, *Sigsworth Simpson*, *George Tindall*, and *Charles Maw*, being called, come, and being chosen, tried, and sworn to speak the truth of and concerning the premises aforesaid in the indictment aforesaid above specified, do say upon their oath, that the said *Joseph Whiteman* and *Thomas Whiteman* are guilty of the premises aforesaid in the indictment aforesaid above specified; whereupon it is considered and adjudged by this Court that the said *Joseph Whiteman* and *Thomas Whiteman* be imprisoned in the house of correction kept for the said riding for the space of six calendar months, and kept to hard labour, each prisoner to be let out on bail on each of them finding two sureties in forty pounds each, until the opinion of the Court above can be obtained on the following case.

Charles Turner, a sworn valuer, proved that he had valued the damage done to the trees and hedge at 5*l.* 14*s.* 6*d.* He stated it would be necessary to stub up the old hedge, and gave the following particulars of his valuation :—

	£.	s.	d.
Stubbing	0	15	0
Posts and rails to protect new hedge	3	10	0
Quickwood setting and cleaning	0	9	6
Injury to trees	1	0	0
	<hr/>		
	£	5	14
		6	

He further stated that he did not value the old hedge, he valued what it would cost to replace it. He could not value the old hedge it was so dilapidated and burned. The Court directed the jury that this was sufficient evidence of injury done to the amount of *5l.* and upwards, as charged in the indictment.

It was objected on the part of the prisoners that as the injury done must amount to *.5l.*, and that as it must be injury done in respect of a growing tree, sapling, or underwood, there was no evidence of such injury beyond one pound.

Charles Hardy,
Chairman.

This case was considered on 30th April 1854, by POLLOCK C. B., PARKE B., CRESSWELL J., ERLE J., and CROMPTON J.

Johnson appeared for the prisoner, but he was stopped by the Court, and

Hardy, who appeared for the Crown, admitted that he could not support the conviction.

POLLOCK C. B.—It is quite clear that this conviction must be quashed. There is, it is true, a *consequential* injury exceeding *5l.*, but that is not sufficient.

The other learned Judges concurred.

Conviction quashed.

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REGINA v. WILLIAM WALKER.

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W. was indicted for cutting and wounding *T. C.* The 1st count charged the cutting with intent to disable. The 2nd with intent to do grievous bodily harm. The 3rd with intent to prevent the lawful apprehension of the prisoner. The evidence shewed that *T. C.* was a serjeant in the *Lancashire* constabulary force, and the prisoner a police constable under him. In the evening of the 3rd of *January* *Clarkson* went, as was his duty, to the house of the prisoner to see that he was correct in the discharge of his duty. The prisoner had some altercation with him, and *Clarkson* left the house, the prisoner followed and struck him, and fell when attempting to strike a second time. *Clarkson* then went away for assistance — returned to the prisoner's house with two police constables. The prisoner was not then at home : they

stable under him. On *C.* going to the prisoner's house to see that he was in the discharge of his duty, an altercation took place, and *C.* left the house, when the prisoner followed and struck him. *C.* went for assistance, and returned with two police constables. The prisoner was from home, and in two hours they returned and told the prisoner to go with them to the station. The prisoner refused, and on *C.* attempting to take hold of him, the prisoner struck him upon the head with a clock weight, inflicting the wounds charged in the indictment. On this evidence the jury found the prisoner guilty upon the 3rd count, and negatived the intents charged in the 1st and 2nd counts of the indictment. Held, that the apprehension was not lawful, and therefore the conviction could not be sustained.

returned again in two hours, and then saw him, and Clarkson told him that he must go with him to the Newton Station. The prisoner said he would not stir an inch that night. Clarkson attempted to take hold of him, whereupon the prisoner struck him on the head with a clock weight and inflicted a severe wound. The jury found him guilty of wounding to prevent his lawful apprehension, and negatived the other intents charged. Having some doubt whether the apprehension was lawful I did not pass sentence, and have to request the opinion of this Court as to the propriety of the conviction. The prisoner could not find bail and remained in custody.

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Case.

C. CRESSWELL.

On the 29th April 1854, this case was considered by POLLOCK C. B., PARKE B., CRESSWELL J., ERLE J., and CROMPTON J. No Counsel appeared either for the Crown or for the prisoner.

POLLOCK C. B.—We are all of opinion that this conviction cannot be sustained. The jury have found the prisoner guilty upon the third count of the indictment which charges that the prisoner committed the assault with intent to prevent his lawful apprehension. We are of opinion that the apprehension was not lawful. The assault for which the prisoner might have been apprehended was committed at another time and at another place; there was no continued pursuit of the prisoner, and the interference of the prosecutor was not for the purpose of preventing an affray, nor of arresting a person whom he had seen committing an assault. The apprehension, therefore, not being lawful it follows that the prisoner could not be convicted of an assault with intent to resist his lawful apprehension.

PARKE B.—On the authority of *Timothy v. Simpson*,

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reported in 1 C. M. & R. 757, the officer might arrest if there was danger of an affray being renewed, but that cannot be said to have been so in the present case.

CRESSWELL J., ERLE J. and CROMPTON J. concurred.

Conviction quashed.

1854.

REGINA v. DAVID PRATT.

THE following case was stated by the Recorder of the borough of *Birmingham*.

The prisoner, *David Pratt*, was tried before me at the last *January* sessions for the borough of *Birmingham*, upon a charge of having feloniously stolen, taken, and carried away, on the 18th day of *May*, in the 16th year of our Sovereign Lady the Queen, one die lathe, the goods of *Edward Barker* and another ; and, on the 19th day of *May*, in the same year, ten lathes, the property of the said *Edward Barker* and another, the goods and chattels of the prosecutors, and was found guilty.

The prisoner was a thimble maker and manufacturer, carrying on his business in two mills, one a thimble mill, and the other a rolling mill, in the borough of *Birmingham*; and, before the occurrences hereinafter mentioned, he was the owner and proprietor of the property mentioned in the indictment.

On the 14th *May* 1853, the prisoner, being in pecuniary difficulties, arranged with the prosecutors, *Edward Barker*, and *William Wayte*, creditors of the prisoner, and with Mr. *Collis*, an attorney-at-law, who acted on their behalf, to execute an assignment to trustees for the benefit of his creditors ; and on the 18th *May* a deed of assignment was executed by him,

The prisoner assigned his goods by deed to trustees for the benefit of his creditors. No manual possession was taken under the assignment, but the prisoner remained in possession of the goods himself, and while in such possession he removed the goods, intending to deprive the creditors of them. The jury found the prisoner guilty of larceny, and found that the goods were not in the custody of the prisoner as the agent of the trustees. Held, that the conviction was wrong.

whereby the prisoner assigned to the prosecutors as trustees, for the purposes therein mentioned, certain property by the description following :

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Case.

" All and every the engines, lathes, rolls, boilers, furnaces, horses, carts, machinery, tools, and implements of trade, the stock in trade, goods, wares, merchandize, household furniture, fixtures, plate, linen, china, books of account, debts, sum and sums of money, and all securities for money, vouchers, and other documents and writings, and all other the personal estate and effects whatsoever and wheresoever, save and except leasehold estates of the said *David Pratt*, in possession, reversion, remainder, or expectancy, together with full and free possession, right, and title of entry, in and to all and every of the mills, works, messuages or tenements, and premises, wherein the said several effects and premises then were, to have and to hold the said engines and other the premises unto the said *Edward Barker* and *William Wayte*, their executors, administrators, and assigns, absolutely."

The deed was executed by the prisoner, in the presence of, and was attested by, *James Rous*, who was a clerk of Mr. *Collis*, and who was not an attorney or solicitor.

On the 19th *May*, the said deed was again executed by the prisoner, in the presence of the said Mr. *Collis*, and, in all respects, in conformity with the provisions of the 68th section of the Bankrupt Law Consolidation Act, 1849, with the view of preventing the deed from operating as an act of bankruptcy.

The deed had been duly stamped on its first execution, but no stamp was affixed on its second execution, which omission was made the ground of an objection to its receipt in evidence. I admitted it, however, subject to the opinion of this honourable Court, which I directed should be taken if it became necessary.

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At the time of the first interview with Mr. *Collis*, on the 14th *May*, the prisoner said he had stopped work altogether; but, on the 16th, it was arranged between him and Mr. *Collis*, that the rolling business should be allowed to go on to complete some unfinished work. Mr. *Collis* then told him to keep an account of the wages of the men employed on the rolling work, and to bring it to the trustees. This the prisoner did on the 19th *May*, when the wages were paid by the trustees, and the rolling business finally stopped.

In the nights of *Monday*, the 16th of *May*, and of every other day during that week, the prisoner removed property conveyed by the deed, including the articles mentioned in the indictment, from the thimble and rolling mills, (some of the heavier machines being taken to pieces for the purpose of removal), and hid them in the cellar and other parts of the house of one of his workmen. Some time afterwards, and after the sale by the trustees of the remainder of the property, a Mr. *Walker*, who had been a large purchaser at the sale, recommenced the business at the thimble and rolling mills, and the prisoner acted as his manager when the property, which formed the subject of the indictment, was by the prisoner's directions brought back at intervals to the mills.

No manual possession of the property was taken by the prosecutors prior to its removal from and back to the mills, but the prisoner remained in possession after the execution of the deed in the same manner as before.

I asked the jury three questions.

1. Did the prisoner remove the property after the execution of the deed of assignment?
2. Did he so act with intent fraudulently to deprive the parties beneficially entitled under the deed of the goods?
3. Was he at the time of such removal in the care

and custody of such goods as the agent of the trustees under the deed ?

I put these three questions to the jury separately, and they answered them separately as follows :—

1. He did remove the property after the execution of the assignment.

2. He did so remove it with such fraudulent intent ; and lastly,

3. He was not in the care and custody of the goods as the agent of the trustees, and thereupon (being of opinion that the two affirmative answers would support a conviction notwithstanding the third answer in the negative) I directed the jury to find the prisoner guilty, which they did.

The questions for the opinion of the Court are,

1. Whether the deed of assignment ought to have been received in evidence ?

2. Whether my direction to the jury was correct ?

And lastly. Whether the conviction is valid ?

M. D. Hill,
Recorder.

This case was argued on 3rd June 1854, before Lord CAMPBELL C. J., ALDERSON B., COLERIDGE J., MARTIN B., and CROWDER J.

Bittleston (Field with him) for the prisoner. It is submitted that this conviction is wrong. There are two points for the consideration of the Court. It is contended, in the first place, that the prisoner was in the lawful possession of the goods, and the maxim, *Furtum non est ubi initium habet detentionis per dominum rei*, is applicable to the present case. It is conceded that the trustees under the assignment may have had such a possession as would have enabled them to maintain a civil action of trespass against a third person; but still they had no possession, constructive or other-

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wise, so as to make the prisoner guilty of larceny. The doctrine of constructive possession in relation to larceny was very fully considered in the recent case of *Regina v. Reed*, which was argued before the fifteen Judges (a), which shews that, for the purposes of larceny, the possession of a servant is not the possession of the master until the servant has done something to determine his exclusive possession, and in that case the coals alleged to have been stolen by the prisoner were held to be sufficiently in the possession of the master when they were delivered into the master's cart. It cannot be contended on the part of the prosecution that the prisoner was a bailee and broke bulk, for the jury have by their verdict negatived the fact of bailment, and although by executing the deed he had divested himself of the property, he had done nothing to determine the possession. In the second place, it is contended that the deed required restamping. On the day when it was first executed it was a perfect instrument, valid between the parties, but was an act of bankruptcy if proceedings were taken upon it within twelve months. This being so the parties wished, by having it re-executed in the presence of an attorney, to give it a different effect, and I contend that the deed when so re-executed required to be re-stamped.

Lord CAMPBELL C. J.—Would not the re-execution be a mere nullity?

Bittleston. Probably that would be so.

A. Wills, for the prosecution, contended that this was a case of bailment, and that the prisoner by breaking bulk determined his possession, and that although the jury had found that he was not an agent, that finding did not negative his being a bailee.

LORD CAMPBELL C. J.—The jury expressly find that the prisoner was not in the care and custody of the goods as the agent of the trustees. This clearly negatives a bailment, and that is the only way in which the case can be put on the part of the prosecution. The prisoner therefore being in lawful possession of the goods cannot be convicted of larceny.

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Case.

The other learned Judges concurred.

Conviction quashed.

REGINA v. LARKIN.

1854.

THE following case was stated by the Chairman of the General Quarter Sessions holden at *Pontefract*. (a)

Denis Larkin was indicted in the first count for stealing on the 3rd of May 1854, at *Sheffield*, six pounds weight of steel, the property of *Abraham Brooksbank*, and the indictment contained a second count, which was in the following words:—

(a) Some strong observations were made by one of the learned Judges as to the unnecessary matter which was introduced into this case, the entire record having been set out. Although for the reasons given at p. 353, I adhere to the rule of inserting all the cases *verbatim*, I have in the present instance

omitted such part as is clearly irrelevant; but it is to be hoped that in future the gentlemen upon whom the duty of preparing cases from sessions devolves will refrain from introducing any matter which is not necessary to the decision of the points reserved for the opinion of the Court.—H. R. D.

A count for receiving stolen goods the property of *A. B.*, alleged that the prisoner received the same, the said *A. B.* well knowing them to have been stolen. The error was discovered after verdict, and the prisoner's counsel moved in arrest of judgment, on which the Court amended the

count by striking out *A. B.* and inserting the name of the prisoner. Held: 1. That the count, as it stood before amendment, was bad, in not alleging the *scienter*. 2. That the objection was properly taken. 3. That the Court had no power to amend after verdict. It was ordered that the record be restored to its original state, and a verdict of not guilty entered.

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Case.

"And the jurors aforesaid upon their oath aforesaid, do further present that the said *Denis Larkin* afterwards, to wit on the same day and year aforesaid, with force and arms at the parish of *Sheffield* aforesaid, in the riding aforesaid, the same six pounds weight of steel of the goods and chattels of the said *Abraham Brooksbank*, then lately before feloniously stolen, taken and carried away, then and there feloniously did receive, he the said *A. Brooksbank* then and there well knowing the said last mentioned goods and chattels to have been feloniously stolen, taken and carried away, against the form of the statute in that case made and provided, and against the peace of our said lady the Queen, her crown and dignity."

On the trial no evidence was offered on the first count, but a verdict of guilty on the second count was returned, the error not having up to that time been observed by the Court. To prove the scienter, the Counsel for the prosecution proposed to ask a witness for the prosecution whether he had ever sold goods at other times to the prisoner which he (witness) had stolen from other persons than the prosecutor. Counsel for the prisoner objected that the evidence was not receivable. Objection allowed. In cross-examination, Counsel for the prisoner asked the witness, for the purpose of impeaching his credit, whether he had ever stolen anything before? Answer, yes. Question, how many times? Answer, between four and five. On re-examination, Counsel for the prosecution proposed to ask the witness, for the purpose of proving that he had sold the scraps stolen on the said four or five occasions to the prisoner, what he had done with them? Objected to, as before. Objection overruled on the ground that the evidence was let in by the above cross-examination, and the witness then

stated that he had sold the scraps stolen on former occasions to the prisoner.

The opinion of the Court of Appeal is requested whether the above-mentioned evidence was admissible either in the first instance, or in consequence of the cross-examination of the witness by the prisoner's Counsel?

After the verdict had been recorded, the Counsel for the prisoner moved that the judgment should be arrested on the ground that the indictment did not allege any guilty knowledge in the prisoner.

The Counsel for the prosecution argued—

1st. That as the objection had not been brought to the notice of the Court by demurrer, or otherwise, before the jury had given their verdict, the Counsel for the prisoner was not at liberty to move in arrest of judgment at the time when he did so move.

2nd. That the second count was good, it being allowable to reject the words, "the said *Abraham Brooksbank*," as surplusage for which he cited *R. v. Morris*, 1 Leach, C. C. 103. *See*

3rd. That the indictment might be amended.

The Court were of opinion that the count was good as it stood, but they amended the indictment by striking out the words " *Abraham Brooksbank*," and substituting for them the words " *Denis Larkin*," between the words "he the said," and the words, "well knowing," in the second count, so that it correctly alleged a guilty knowledge in the prisoner, and sentence was passed, subject to the opinion of the Court of Criminal Appeal, on the following questions.

1st. Whether the prisoner's Counsel was at liberty to move in arrest of judgment at the time he did move?

2nd. Whether it was not allowable to reject the

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words "the said *Abraham Brooksbank*," as surplusage, so that the second count was good as it originally stood?

3rd. Whether the Court had power to amend the indictment in the manner above stated?

4th. If the opinion of the Court of Criminal Appeal is that the conviction is bad, their opinion is further requested on the point, whether a fresh indictment, correctly alleging the guilty knowledge, will lie against the prisoner?

Wilson Overend,
Chairman.

This case was considered on 3rd June 1854, by Lord CAMPBELL C. J., ALDERSON B., COLERIDGE J., MARTIN B., and CROWDER J.

Hall, for the prosecution.

Heaton, for the prisoner.

Hall, on an intimation from the Court, refrained from arguing the question.

Lord CAMPBELL C. J.—The indictment is bad on the face of it, in not alleging the *scienter*. There was clearly a right to move in arrest of judgment. There was clearly no power to amend. We direct that the record be restored to its original state, and a verdict of not guilty entered.

The other learned Judges concurred.

Conviction quashed.

*Leigh of Far 5761 v. 57
x 20 and R 366*

REGINA v. GEORGE FEATHERSTONE.

S.C. 621 v. 376

1854.

THE prisoner, *George Featherstone*, was tried at the Spring Assizes, 1854, holden at Worcester. The indictment charged him with stealing twenty-two sovereigns and some wearing apparel.

It appeared that the prosecutor's wife had taken from the prosecutor's bed room thirty-five sovereigns and some articles of clothing, and that when she left the house she called to the prisoner, who was in a lower room with the prosecutor and other persons, and said "*George, it's all right, come on.*" Prisoner left in a few minutes after.

The prisoner and the wife were afterwards seen together at various places, and eventually were traced to a public house, where they passed the night together. When taken into custody the prisoner had twenty-two sovereigns upon him.

The jury found the prisoner guilty, stating that they did so "on the ground that he received the sovereigns from the wife, knowing that she took them without the authority of her husband."

Whereupon the Judge respite the judgment, admitted the prisoner to bail, and reserved for the opinion of the Court of Criminal Appeal the question whether a delivery of the husband's goods, by the wife to the adulterer, with knowledge by him, that she took them without the husband's authority, was sufficient to maintain the indictment for felony against him ?

WILLIAM WIGHTMAN.

guilty on the ground that he received the sovereigns from the wife knowing that she took them without the authority of her husband. Held, that the conviction was right

The prisoner was charged with stealing twenty-two sovereigns and some wearing apparel. The prosecutor's wife took from the prosecutor's bed room thirty-five sovereigns and some articles of clothing, and left the house, saying to the prisoner, who was in a lower room, "Its all right, come on." The prisoner and the prosecutor's wife were afterwards seen together, and were traced to a public house, where they slept together. When taken into custody, the prisoner had twenty-two sovereigns on him. The jury found the prisoner

1854.

FEATHER-
STONE'S
Case.

This case was, in fact, reserved by the late Mr. Justice *Talfourd*, but had not been signed, as prescribed by the second section of the 11 & 12 Vict. c. 78, and on this being mentioned to this Court on 29th April 1854, they were of opinion that Mr. Justice WIGHTMAN, the other Judge named in the commission, was virtually present at the trial, and that, therefore, if he signed the case, it would be a sufficient compliance with the statute. This was afterwards done, and the case was considered on 3rd June 1854, by Lord CAMPBELL C. J., ALDERSON B., COLERIDGE J., MARTIN B., and CROWDER J.

No Counsel appeared.

Lord CAMPBELL C. J.—We are of opinion that this conviction is right. The general rule of law is, that a wife cannot be found guilty of larceny for stealing the goods of her husband, and that is upon the principle that the husband and wife are, in the eye of the law, one person ; but this rule is properly and reasonably qualified when she becomes an adulteress. She thereby determines her quality of wife, and her property in her husband's goods ceases. The prisoner was her accomplice, and the jury find that he assisted her, and took the sovereigns, knowing that she had taken them without the husband's consent. It is said, in 1 *Russell on Crimes*, page 23, that a stranger cannot commit larceny of the husband's goods by the delivery of the wife ; but a distinction is pointed out where he is her adulterer. In *Dalton*, page 353, it is said, “but it should be observed that if the wife should steal the goods of her husband, and deliver them to *B.*, who knowing it carries them away, *B.*, being the adulterer of the wife, this, according to a very good opinion, would be felony in *B.*, for in such case no consent of the husband can be presumed.” That case is identical with the present. The prisoner knew that

it was without the consent of the husband. We think
the conviction was clearly right.

1854.

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Case.

ALDERSON B.—An adulterer cannot be allowed to set up as a defence a delivery by the wife when he knows the circumstances under which the goods were taken by the wife from the husband.

The other learned Judges concurred.

Conviction affirmed.

REGINA v. EDWARD SAMWAYS and JOSEPH WILLIS.

1854.

THE following case was stated for the opinion of this Court by the Chairman of the General Quarter Sessions of the Peace for the county of *Dorset*.

At a General Sessions of the Peace for the county of *Dorset*, held at *Dorchester* on the 1st day of *March* 1854, *Edward Samways* and *Joseph Willis* were tried before myself and others for having, whilst servants to one *John Scutt*, feloniously stolen, on the 14th of *February* last, four sacks of barley and three sack bags, the property of the said *John Scutt* their master.

The prisoners were charged with stealing four sacks of barley and three sack bags from their master. It was proved in evidence that the prisoners and one *B.* were employed by the prosecutor to winnow

barley which he had mixed with canary seed. One of the prisoners fetched several sacks from the prosecutor's house, which he and *B.* filled with barley. The two prisoners then sent *B.* home before the usual time. At twelve o'clock on the night of the same day, the carter went into the stable with a lantern, and shortly afterwards the two prisoners entered the stable. In a few minutes after this the prosecutor saw the carter in the loft above with a lantern, and found the two prisoners concealed under straw in the loft, and then in a dust bin in a stable beneath he found three sacks full of barley mixed with canary seed, which he swore was of the same kind which he had mixed. It was no part of the duty of the prisoners to place the barley in sacks, or to put the sacks of barley into the dust-bin. The jury found both the prisoners guilty. Held, that the evidence was sufficient to support the conviction.

1854. A second count also charged them with feloniously receiving the same.

SAMWAY'S Case.

The evidence on the part of the prosecution was substantially as follows:—The two prisoners, with a girl named *Emily Burden*, were employed on the 14th of *February* 1854, by *John Scutt* (the prosecutor) to winnow some barley in his barn, and having reason to suspect that some of his barley had been taken away, the prosecutor mixed about a pint of canary seed with the barley in the barn on the said 14th of *February*, before the two prisoners began to winnow the same; and during the afternoon of this day one of the prisoners (viz. *Edward Samways*) was seen to enter the prosecutor's house and bring away several sacks from that house into the barn, and then he and *Emily Burden* filled these sacks with the barley. The prisoners then told *Emily Burden* that she might go home, although the usual hour of her leaving work had not quite arrived. At twelve o'clock on this same night the prosecutor *John Scutt* and his brother *Robert Scutt* placed themselves to watch the barn and the stable, and first saw *William Bowring* the carter enter the stable with a lantern in his hand, and soon after this they distinctly saw the two prisoners enter the stable also. In about three minutes after this the prosecutor also entered the stable, but found no one there; but upon his calling out, the said *William Bowring* answered from the loft, which is above the stable; and upon the prosecutor's going up a sort of ladder through the rick into the loft, he saw *William Bowring* there with a lantern, and then, upon moving some straw with a pike, he found the two prisoners concealed under the straw. No barley and no sack were found in the loft; but upon the prosecutor's going down from the loft into the stable, there and in a bin, or dust-coop, which was in an

aperture of the wall between the stable and the barn, the prosecutor found three sacks full of barley, and that barley, upon examination, was proved to have canary seed mixed with it. The prosecutor *John Scutt* swore to his barley (samples of which were produced in Court) not merely from the barley being of the same kind and species as the barley which he had in his barn, but especially from the fact that the canary seed which was found in the barley taken from the barn, was also found in the three sacks of barley which were found in the dust-bin in the stable. The prosecutor (*John Scutt*) also swore that it was no part of the duty of the prisoners to place the barley in sacks, and that he had never desired them to do so, least of all to place the sacks containing barley in the dust-bin in the stable, where the said three sacks of barley were found covered over with dust. In summing up this evidence to the jury, I told them distinctly that the charges against the prisoners were twofold, and quite distinct. That with regard to the first count, which charged the two prisoners with the felonious stealing of the said several chattels, a positive or constructive taking and asportation of the barley, or the bags, one or the other, or both, must be proved jointly or severally to have been committed by the prisoners; and that it was for them the said jury to say whether, according to the evidence, the prisoners were proved to have so feloniously taken away and appropriated the barley or the bags (the one or the other, or both) belonging to the prosecutor. With regard to the second count, which charged the two prisoners with having feloniously received the said four sacks of barley and three bags, well knowing the same to have been feloniously stolen, I most distinctly told the jury that they must be satisfied (according to the doctrine laid down in the case of

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Regina v. John Wiley, as reported in 4 Cox's Criminal Cases, 412) that there was "an actual or constructive possession" of the stolen chattels by the prisoners (one or both), the question being whether the prisoners were ever seen carrying away the sacks of barley, or any parts or portions of the same : or whether they were ever seen in the same room or place where the three sacks of barley were found by the prosecutor, the evidence shewing that although the two prisoners were seen to enter the stable at twelve o'clock at night, *William Bowring* was also shewn to have entered that same stable with a lantern a few minutes before the two prisoners entered that stable ; and that the acts imputed to the prisoners might, by possibility, have been committed by *William Bowring*. The jury having found both the prisoners guilty, under the first count of the indictment, of having feloniously stolen the said barley and bags, the Court sentenced the said two prisoners to twelve calendar months' imprisonment, with hard labour ; but after the verdict had been recorded, and the sentence had been passed by the Court, the Counsel, on the part of the prisoners, applied to the Court to grant a case for the consideration of the Judges of the Court of Criminal Appeal, on the ground that, in point of law, the jury were wrong in finding the prisoners guilty of stealing the four sacks of barley, inasmuch as there was no evidence to shew that the prisoners ever had the said four sacks of barley in their possession, or that they had ever actually or constructively taken the same from the prosecutor with a felonious intent. Whereupon the Court granted a case for the consideration of the said Court of Criminal Appeal, and respited and arrested the judgment passed upon the said two prisoners, who are now in prison. And the question which I now most

respectfully submit to the consideration of her Majesty's Justices of either Benches, and Barons of the Exchequer, in pursuance of the statute in such case made and provided, is, whether the above facts do warrant, in point of law, the finding of the jury in this case ?

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Case.

H. F. Yeatman,
Chairman of the *Dorset* General Sessions.

This case was considered on 3rd June 1854, by Lord CAMPBELL C. J., ALDERSON B., COLERIDGE J., MARTIN B., and CROWDER J.

Fooks, for the prisoner. It is submitted that there is no evidence of an asportation. The sacks were not identified. Both prisoners were found guilty of stealing, and there is no evidence of their acting in concert.

Lord CAMPBELL C. J.—There is overwhelming evidence against both the prisoners.

The other learned Judges concurred.

Conviction affirmed.



1854.

REGINA v. JOHN EAGLETON.

The defendant contracted in writing with the guardians of a parish to supply and deliver

for a certain term to the out-door poor, at such times as the guardians should direct, loaves of bread of three and a half pounds weight each. The guardians were, during the said term, to pay the defendant after certain rates and prices for the bread so supplied, and of which a bill of particulars should have been sent. The contract contained a proviso, that in case the defendant broke the terms of his contract in any of the ways therein named, one of which was by a deficiency in the weight stated and charged for in the said bill of particulars, the guardians might employ other persons to supply the bread, and charge the defendant with the costs of such supply above the price contracted for, and might retain any moneys due to the defendant under the contract at the time of such breach towards such costs, or the damages which the board might sustain, and might also put in suit against the defendant a bond which he then executed, and which was conditioned for the due performance of his contract.

The indictment contained ten counts, the first seven of which were in substance the same, and charged the defendant with a common law misdemeanor, in supplying as such contractor loaves of bread which were deficient in weight, with intent to injure and defraud the said poor persons, and to cheat and defraud the said guardians.

The three last counts charged the common law misdemeanor of endeavouring to obtain money by false pretences.

It was proved in evidence, that on poor persons applying for relief the relieving officer gave the applicant a ticket, the presentation of which to the defendant entitled him to receive a loaf; that the defendant received these tickets, and gave to the poor persons presenting them loaves of bread which the jury found were deficient in weight, and were so with the knowledge of the defendant.

By the course of dealing, the defendant would return the tickets in the following week, with a statement in writing of the number of loaves he had supplied, and the relieving officer would credit the defendant in account with the guardians with the amount, and the money would then be paid to him at the time stipulated in the contract. The tickets were so returned by the defendant, with a note in the defendant's handwriting stating the number of tickets sent back, and he was so credited as aforesaid. The jury found that the defendant intended to defraud the out-door poor, and that by returning the tickets to the relieving officer he intended to represent that he had delivered the loaves mentioned in them of the weights stated.

Quære, whether the first seven counts disclosed any legal offence, and whether the evidence was sufficient to warrant a conviction on the three last counts, or merely shewed an attempt to obtain credit in account?

day of *March* 1854, upon an indictment, a copy of 1854.
which is annexed (a).

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(a) The following are copies of the indictment, contract and bond referred to in the case.

INDICTMENT.

Borough of } The jurors for
Great Yarmouth } our Lady the
to wit. } Queen upon their
oaths present that heretofore to wit on the 3rd day of *December* in the year of our Lord 1853 in the parish of *Great Yarmouth* in the borough of *Great Yarmouth* within the jurisdiction of this Court the guardians of the poor of the said parish of *Great Yarmouth* in the county of *Norfolk* duly and publickly advertised in a certain county newspaper to wit the *Norfolk Chronicle* for tenders for the supply of bread made from the best household flour at per loaf of three pounds and one half of a pound for out relief from the 24th day of *December* in the year aforesaid till the 25th day of *March* then next. And the jurors aforesaid upon their oaths aforesaid do further present that thereupon *John Eagleton* of the parish aforesaid in the borough aforesaid baker to wit on the 22nd day of *December* in the year first aforesaid duly tendered and he then and there duly and in pursuance of the statutes in such case made and provided and in due and full compliance with the rules orders and regulations made and issued by the Poor Law Commissioners for *England* and *Wales* became and was the contractor with the said guardians for the supply to the out door poor of the said parish at such time and in such manner as the said guardians or any other person or persons duly authorized by them should from time to time

direct of such quantities of bread made from the best household flour in loaves weighing three pounds and one half of a pound at seven-pence per loaf as should be required by the said guardians for the use of the out door poor of the said parish. And the jurors aforesaid upon their oaths aforesaid do further present that after making the said engagement and undertaking and whilst the said *John Eagleton* was such contractor as aforesaid to wit on the 21st day of *January* in the year of our Lord 1854 at the parish aforesaid in the borough aforesaid and within the jurisdiction of this Court *William Harbert* then being one of the relieving officers of the poor of the said parish by the orders and authority of the said guardians of the poor then and there gave as and for relief to divers to wit 100 poor persons being out door poor of the said parish divers to wit 100 orders and tickets signed under the authority aforesaid by the said *William Harbert* for the supply of divers to wit two loaves of bread to each of the said poor persons respectively. And that the said *William Harbert* being duly authorized in that behalf as aforesaid then and there directed the said poor persons to produce and shew and that the said poor persons did then and there produce and shew to the said *John Eagleton* the said orders and tickets in order that the said *John Eagleton* might supply and deliver to the said poor persons respec-

1854. The evidence was a contract, dated 27th *December* 1853, and a bond of the same date (copies of
EAGLETON'S Case.

tively for their sustenance and support the number of loaves specified in the said orders and tickets respectively. And that the said *William Harbert* thereby then and there being duly authorized in that behalf as aforesaid ordered and directed the said *John Eagleton* to supply and deliver to the said poor persons respectively the number of loaves of bread in the said orders and tickets respectively specified in pursuance of and according to the terms of his said contract and undertaking. And the jurors aforesaid upon their oaths aforesaid do further present that the said poor persons were not nor was any or either of them authorized by the said guardians or by the said *William Harbert* or by any or either of them or by any other person whatsoever to obtain and that the said poor persons were and each and every of them was wholly unable to obtain the said loaves of bread or any bread whatsoever by means of the said orders and tickets elsewhere or from any other baker or person whatsoever but only from him the said *John Eagleton* of all which premises the said *John Eagleton* then and there had notice. And the jurors aforesaid upon their oaths aforesaid do further present that the said *John Eagleton* then to wit on the day and year last aforesaid at the parish aforesaid in the borough aforesaid and within the jurisdiction of this Court so being such contractor as aforesaid not regarding his duty in that behalf but under colour and pretence of his said contract and contriving and intending to injure and defraud the said poor persons respectively

and to deprive them of proper and sufficient food and sustenance and to endanger their healths and constitutions respectively and further contriving and intending to cheat and defraud the said guardians unlawfully and fraudulently supplied and delivered to divers to wit fifty of the said poor persons who then respectively produced and shewed to the said *John Eagleton* the said orders or tickets as aforesaid divers to wit 100 loaves of bread as and for loaves of bread weighing respectively three pounds and one half of a pound each loaf. Whereas the said loaves respectively as he the said *John Eagleton* then well knew were not of the weight of three pounds and one half of a pound each loaf but each of them was of a far less weight to wit of the weight of three pounds and four ounces and no more, in breach of his duty as such contractor as aforesaid, to the fraud great damage and prejudice of the said poor persons respectively and to the great danger of their healths and constitutions respectively, in contempt of our said lady the Queen and her laws and to the evil example of others and against the peace of our said lady the Queen her crown and dignity.

2nd Count. And the jurors for our said lady the Queen upon their oaths present that heretofore to wit on the 3rd day of *December* in the year of our Lord 1853 at the parish of *Great Yarmouth* in the borough of *Great Yarmouth* and within the jurisdiction of this Court the guardians of the poor of the parish of *Great Yarmouth* in the county of *Norfolk* duly and

which are also annexed); and it was proved that, on poor persons applying for out-door relief, the reliev-

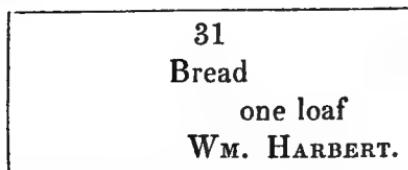
1854.

EAGLETON'S
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publickly advertised in a certain county newspaper to wit the *Norfolk Chronicle* for tenders for the supply of bread made from the best household flour at sevenpence per loaf of three pounds and one half of a pound for out relief from the 24th day of *December* in the year aforesaid till the 25th day of *March* then next. And the jurors aforesaid upon their oaths aforesaid do further present that thereupon *John Eagleton* of the parish aforesaid in the borough aforesaid baker to wit on the 23rd day of *December* in the year first aforesaid duly tendered and he then and there duly and in pursuance of the statutes in such case made and provided and in due and full compliance with the rules orders and regulations made and issued by the Poor Law Commissioners for *England* and *Wales* became and was the contractor with the said guardians for the supply to the out door poor of the said parish at such times and in such manner as the said guardians or any person or persons duly authorized by them should from time to time direct of such quantities of bread made from the best household flour in loaves weighing three pounds and one half of a pound at sevenpence per loaf as should be required by the said guardians for the use of the out door poor of the said parish. And the jurors aforesaid upon their oaths aforesaid do further present that after making of the said agreement and undertaking and whilst the said *John Eagleton* was such contractor as aforesaid to wit on the 21st day of *January* in the year of our Lord 1854 at the

parish aforesaid in the borough aforesaid and within the jurisdiction of this court *William Christmas Nutman* then being one of the relieving officers of the poor of the said parish by the orders and authority of the said guardians of the poor then and there gave as and for relief to divers to wit 100 poor persons being out door poor of the said parish divers to wit 100 orders or tickets signed by the said *William Christmas Nutman* for the supply of divers to wit two loaves of bread to each of the said poor persons respectively and that the said *William Christmas Nutman* being duly authorized in that behalf aforesaid then being and there directed the said poor persons to produce and shew and that the said poor persons did then and there produce and shew to the said *John Eagleton* the said orders and tickets in order that the said *John Eagleton* might supply and deliver to the said poor persons respectively for their sustenance and support the number of loaves of bread specified in the said orders and tickets respectively and that the said *William Christmas Nutman* thereby then and there being duly authorized in that behalf aforesaid ordered and directed the said *John Eagleton* to supply and deliver to the said poor persons respectively the number of loaves of bread in the said orders and tickets respectively specified in pursuance of and according to the terms of his said contract and undertaking. And the jurors aforesaid upon their oaths aforesaid do hereby further present that the said poor persons were not nor

1854. ing officer gave the applicant a ticket, in the following form :—
EAGLETON'S Case.



The poor person on presenting the ticket to the

was any or either of them authorized by the said guardians or by the said *William Christmas Nutman* or by any or either of them or by any other person whatsoever to obtain and that the said poor persons were and each and every of them was wholly unable to obtain the said loaves of bread or any bread whatsoever by means of the said orders and tickets elsewhere or from any other baker or person whatsoever but only from him the said *John Eagleton* of all which premises he the said *John Eagleton* then and there had notice. And the jurors aforesaid upon their oaths aforesaid do further present that the said *John Eagleton* then to wit on the day and year last aforesaid at the parish aforesaid in the borough aforesaid and within the jurisdiction of this court so being such contractor as aforesaid not regarding his duty in that behalf but under colour and pretence of his said contract and contriving and intending to injure and defraud the said poor persons respectively and to deprive them of proper and sufficient food and sustenance and to endanger their healths and constitutions respectively and further intending and contriving to cheat and defraud the said guardians unlawfully and fraudulently supplied and delivered to divers to wit

50 of the said poor persons who then respectively produced and shewed to the said *John Eagleton* the said orders or tickets as aforesaid divers to wit 100 loaves of bread as and for loaves of bread weighing respectively three pounds and one half of a pound each loaf whereas the said loaves respectively as he the said *John Eagleton* then and there well knew were not of the weight of three pounds and one half of a pound each loaf but each of them was of a far less weight to wit of the weight of three pounds and four ounces and no more in breach of his duty as such contractor as aforesaid to the fraud and great damage and prejudice of the said poor persons respectively and to the great danger of their healths and constitutions respectively in contempt of our said lady the Queen and her laws to the evil example of others and against the peace of our said lady the Queen her crown and dignity.

3rd Count. And the jurors aforesaid upon their oaths aforesaid do further present that heretofore to wit on the 22nd day of *December* in the year of our Lord one thousand eight hundred and fifty-three at the parish of *Great Yarmouth* in the borough of *Great Yarmouth* and within the jurisdiction of this court *John Eagleton* of the parish

defendant, was entitled to receive a loaf, and could not obtain a loaf elsewhere on such ticket.

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Case.

aforesaid in the borough aforesaid baker became and was a contractor with the guardians of the poor of the said parish for the supply of bread to the poor of the said parish and thereby then and there engaged with and undertook to the said guardians to supply the poor of the said parish with bread made from the best household flour in loaves weighing three pounds and one half of a pound at sevenpence each loaf for a certain period to wit from the 24th day of *December* in the year of our Lord 1853 to the 25th day of *March* then next and during that time to deliver such loaves of bread to such poor persons of the said parish and at such times and in such quantities as he should be ordered and directed to do by tickets or orders of the several relieving officers of the said parish being persons duly authorized in that behalf by the said guardians which should be produced and shewn to him the said *John Eagleton* by the said poor persons respectively. And the jurors aforesaid upon their oaths aforesaid do present that after the making the said engagement and undertaking and during the period aforesaid and whilst the said *John Eagleton* was such contractor as aforesaid to wit on the 21st day of *January*, in the year of our Lord 1854 at the parish aforesaid in the borough aforesaid and within the jurisdiction of this Court divers orders and tickets signed by the several relieving officers of the said parish for the supply of divers loaves of bread to divers poor persons of the said parish were produced and shewn by the said poor

persons respectively to the said *John Eagleton* whereby the said *John Eagleton* was directed and ordered by the said several relieving officers being persons duly authorized in that behalf aforesaid to supply and deliver divers loaves of bread to the said poor persons respectively in pursuance of and according to the terms of his said contract and undertaking and that the said poor persons were not nor was any or either of them authorized by the said guardians or by the said relieving officers or by any or either of them or by any other persons whatsoever to obtain and that the said poor persons were and each and every were wholly unable to obtain the said loaves of bread or any bread whatsoever by means of the said orders or tickets elsewhere or from any other baker or persons whatsoever but only from him the said *John Eagleton* of all which premises the said *John Eagleton* then and there had notice. And the jurors aforesaid upon their oaths aforesaid do further present that the said *John Eagleton* then to wit on the day and year last aforesaid in the parish aforesaid in the borough aforesaid and within the jurisdiction of this Court so being such contractor as aforesaid and not regarding his duty in that behalf but under colour and pretence of his said contract and contriving and intending to injure and defraud the said poor persons respectively and to deprive them of proper food and sustenance and to endanger their healths and constitutions respectively and further contriving and intending to cheat and defraud the

1854.
EAGLETON'S
Case.

As many as twenty of these tickets were given on Saturday, the 21st January last, to as many out-door

guardians of the poor of the said parish unlawfully and fraudulently supplied and delivered to divers to wit one hundred of the said poor persons who then respectively produced and shewed to the said John Eagleton the said orders or tickets as aforesaid divers to wit two hundred loaves of bread as and for loaves of bread weighing respectively three pounds and one half of a pound each loaf whereas the said loaves respectively as he the said John Eagleton then well knew were not of the weight of three pounds and one half of a pound each loaf but each of them was of far less weight to wit of the weight of three pounds and four ounces and no more, in breach of his duty as such contractor as aforesaid, to the fraud great damage and prejudice of the said poor persons respectively, to the great danger of their healths and constitutions respectively, in contempt of our said lady the Queen and her laws, to the evil example of others and against the peace of our said lady the Queen her crown and dignity.

4th Count. And the jurors aforesaid upon their oaths aforesaid do further present that the said John Eagleton on the 22d day of December in the year of our Lord 1853 and from thence continually to and at the time of committing the several offences hereinafter mentioned at the parish aforesaid in the borough aforesaid and within the jurisdiction of this court was a contractor with the guardians of the poor of the said parish of Great Yarmouth and as such contractor was during all that time bound to supply and deliver to all such poor per-

sons of the said parish as should produce and shew to him the said John Eagleton a ticket or order of the several relieving officers of the said parish being persons duly authorized by the said guardians in that behalf such number of loaves as should be specified in the said ticket or order respectively of the weight of three pounds and one half of a pound each loaf and that the said John Eagleton so being such contractor as last aforesaid not regarding his duty in that behalf but under colour and pretence of his said contract contriving and intending to injure and defraud and deprive of due sustenance and support and to endanger the healths and constitutions of the poor persons of the said parish and to cheat and defraud the guardians of the said parish on the 21st day of January last aforesaid in the parish aforesaid in the borough aforesaid and within the jurisdiction of this court unlawfully and fraudulently gave and delivered to one Susanna Godfrey then being a poor person of the parish of Great Yarmouth and who then shewed and produced to the said John Eagleton as such contractor as aforesaid a ticket or order signed William Harbert, he then being one of the relieving officers of the said parish duly authorized by the said guardians for the supply of divers to wit two loaves of bread to the said Susanna Godfrey divers to wit two loaves of bread as and for loaves of bread of the weight of three pounds and one half of a pound each loaf which said loaves as he the said John Eagleton then well knew were not then of the

poor by the relieving officer, and the poor persons, on presenting them to the defendant, received the num-

1854.

EAGLETON's
Case.

weight of three pounds and one half of a pound each loaf, but each of them was of much less weight to wit of the weight of three pounds and two ounces and no more, in breach of his duty as such contractor as last aforesaid, to the fraud great damage and prejudice of the said *Susanna Godfrey*, in contempt of our said lady the Queen and her laws to the evil example of others and against the peace of our said lady the Queen her crown and dignity.

5th Count. And the jurors aforesaid upon their oaths aforesaid do further present that the said *John Eagleton* so being such contractor as last aforesaid and contriving and intending afterwards as aforesaid to wit on the day and year last aforesaid at the parish aforesaid in the borough aforesaid and within the jurisdiction of this Court unlawfully knowingly and wickedly in breach of his duty as such contractor did supply and deliver to one *Elizabeth Bowles* then being a poor person of the said parish of *Great Yarmouth* and who then produced and shewed to the said *John Eagleton* as such contractor as aforesaid a ticket or order signed by *William Harbert*, he then being one of the relieving officers of the said parish and duly authorized by the said guardians for the supply of divers to wit two loaves of bread to the said *Elizabeth Bowles*, divers to wit two loaves of bread as and for loaves of bread of the weight of three pounds and one half of a pound each loaf, which last mentioned loaves as he the said *John Eagleton* then well knew were not of the weight of three

pounds and one half of a pound each but each of them was of much less weight to wit of the weight of three pounds and three ounces and no more, in breach of his duty as such contractor as aforesaid to the fraud great damage and prejudice of the said *Elizabeth Bowles* in contempt of our said lady the Queen and her laws to the evil example of others and against the peace of our said lady the Queen her crown and dignity.

6th Count. And the jurors aforesaid upon their oaths aforesaid do further present that the said *John Eagleton* so being such contractor as last aforesaid and contriving and intending as aforesaid afterwards to wit on the day and year last aforesaid at the parish aforesaid in the borough aforesaid and within the jurisdiction of this Court unlawfully knowingly and wickedly in breach of his duty as such contractor did supply and deliver to one *Samuel Lingwood* then being a poor person of the said parish of *Great Yarmouth* and who then produced and shewed to the said *John Eagleton* as such contractor as aforesaid a ticket or order signed by *William Christmas Nutman* he then being one of the relieving officers of the said parish and duly authorized by the said guardians for the supply of divers to wit two loaves of bread to the said *Samuel Lingwood* divers to wit two loaves of bread as and for loaves of bread of the weight of three pounds and one half of a pound each loaf which said last mentioned loaves as he the said *John Eagleton* then well knew were not then of the weight of three pounds and one half of a

1854. ber of loaves mentioned in the ticket. By the course
EAGLETON'S of dealing the defendant would return the tickets in
Case.

pound each but each of them was of a much less weight to wit of the weight of three pounds and one ounce and no more in breach of his duty as such contractor as aforesaid to the fraud great damage and prejudice of the said *Samuel Lingwood*, in contempt of our said lady the Queen and her laws, to the evil example of others and against the peace of our said lady the Queen her crown and dignity.

7th Count. And the jurors aforesaid upon their oaths aforesaid do further present that the said *John Eagleton* being such contractor as last aforesaid and contriving and intending as aforesaid afterwards to wit on the day and year last aforesaid at the parish aforesaid in the borough aforesaid and within the jurisdiction of this Court unlawfully knowingly and wickedly in breach of his duty as such contractor did supply and deliver to one *James Mayer* then being a poor person of the parish of *Great Yarmouth* and who then produced and shewed to the said *John Eagleton* as such contractor as aforesaid a ticket or order signed by *William Christmas Nutman*, he being then one of the relieving officers of the said parish and duly authorized by the said guardians for the supply of divers to wit two loaves of bread to the said *James Mayer*, divers to wit two loaves of bread as and for loaves of bread of the weight of three pounds and half of a pound each loaf, which said last-mentioned loaves as the said *John Eagleton* then well knew were not then of the weight of three pounds and one half of a pound each but each of them was of a much less weight

to wit of the weight of three pounds and four ounces and no more, in breach of his duty as such contractor as aforesaid, to the fraud great damage and prejudice of the said *James Mayer*, in contempt of our said lady the Queen and her laws, to the evil example of others and against the peace of our said lady the Queen her crown and dignity.

8th Count. And the jurors aforesaid upon their oaths aforesaid do further present that heretofore to wit on the twenty-first day of January in the year of our Lord one thousand eight hundred and fifty-four at the parish of *Great Yarmouth* in the borough of *Great Yarmouth* and within the jurisdiction of this Court *John Eagleton* of the parish aforesaid in the borough aforesaid baker unlawfully knowingly and designedly did falsely pretend to one *William Christmas Nutman*, then being relieving officer of the said parish of *Great Yarmouth* that he the said *John Eagleton* had on the day and year last aforesaid supplied and delivered to one *Samuel Lingwood*, then being a poor person of the said parish two loaves of bread and that each of the said two loaves of bread then weighed three pounds and one half of a pound, by means of which said false pretences the said *John Eagleton* did then and there unlawfully attempt and endeavour fraudulently falsely and unlawfully to obtain from the guardians of the poor of the said parish a sum of money to wit the sum of one shilling of the monies of the said guardians, with the intent thereby then and there to cheat and defraud. Whereas

the following week, with a statement in writing of the number of loaves he had supplied, but no other par-

1854.

EAGLETON'S
Case.

in truth and in fact the said two loaves of bread did not each weigh nor did either of them weigh three pounds and one half of a pound against the form of the statute in such case made and provided and against the peace of our lady the Queen her crown and dignity.

9th Count. And the jurors aforesaid upon their oaths aforesaid do further present that heretofore to wit on the twenty first day of January in the year of our Lord one thousand eight hundred and fifty four at the parish of *Great Yarmouth* in the borough of *Great Yarmouth* and within the jurisdiction of this court the said *John Eagleton* unlawfully knowingly and designedly did falsely pretend to one *William Christmas Nutman*, he then being a relieving officer of the poor of the said parish, that he the said *John Eagleton* had on the day and year last aforesaid supplied and delivered to one *James Mayer* then being a poor person of the said parish, two loaves of bread and that each of the said two loaves of bread then weighed respectively three pounds and one half of a pound, by means of which said false pretences the said *John Eagleton* did then and there unlawfully attempt and endeavour fraudulently falsely and unlawfully to obtain from the said guardians of the poor of the said parish a sum of money to wit the sum of one shilling of the monies of the said guardians with intent thereby then and there to cheat and defraud, whereas in truth and in fact the said two loaves of bread did not each weigh nor did either of them weigh three

pounds and one half of a pound, against the form of the statute in such case made and provided and against the peace of our lady the Queen her crown and dignity.

10th Count. And the jurors aforesaid upon their oaths aforesaid do further present that heretofore to wit on the twenty first day of January one thousand eight hundred and fifty four at the parish of *Great Yarmouth* in the borough of *Great Yarmouth* and within the jurisdiction of this court the said *John Eagleton* unlawfully knowingly and designedly did falsely pretend to one *William Harbert* he then being a relieving officer of the poor of the parish of *Great Yarmouth* that he the said *John Eagleton* had on the day and year last aforesaid supplied and delivered to one *Elizabeth Bowles*, then being a poor person of the said parish a loaf of bread and that the said loaf of bread then weighed three pounds and one half of a pound, by means of which said false pretences the said *John Eagleton* did then and there unlawfully attempt fraudulently falsely and unlawfully to obtain from the said guardians of the poor of the said parish a sum of money to wit the sum of one shilling of the monies of the said guardians, with intent thereby then and there to cheat and defraud, whereas in truth and in fact the said loaf of bread did not then weigh three pounds and one half of a pound, against the form of the statute in such case made and provided and against the peace of our lady the Queen her crown and dignity.

1854. ticular would be delivered, and the relieving officer would credit the defendant in his books for the
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CONTRACT.

Memorandum of agreement made the 22nd day of *December* 1853 between *John Eagleton* of *Great Yarmouth* in the county of *Norfolk* baker of the one part and the guardians of the poor of the parish of *Great Yarmouth* in the county of *Norfolk* of the other part.

Whereas by a certain order bearing date the 28th day of *February* 1837 under the hands and seals of the Poor Law Commissioners for *England* and *Wales* acting under the powers and authorities of an act passed in the 4th and 5th years of the reign of King *William* the 4th intituled "An Act for the Amendment and better Administration of the Laws relating to the Poor in *England* and *Wales*." It was declared that the laws for the relief of the poor in the parish of *Great Yarmouth* in the county of *Norfolk* should be administered by a board of guardians consisting of sixteen members and that such board of guardians should be elected and constituted according to the provisions of the Poor Law Amendment Act. And whereas a board of guardians have been elected for the said parish in pursuance of a further order bearing date the twentieth day of *March* one thousand eight hundred and thirty-seven. And in and by the rules orders and regulations prescribed by the Poor Law Commissioners for the directions of such board it is amongst other things declared that the board of guardians should order and direct the purchasing of the supplies of bread flour meat and other articles

required for the use in the workhouse or for the relief of the paupers out of the workhouse in such manner as might appear to such guardians best calculated to prevent imposition and to promote economical management and that with such views such purchases should so far as circumstances will allow be made upon tenders after public advertisement in one county newspaper at least. And whereas the board of guardians did on the 3rd day of *December* instant in pursuance of the said directions cause a public advertisement to be inserted in the *Norfolk Chronicle* newspaper circulated in the said county of their intention to receive at a meeting of the said Board to be held on the 16th day of *December* for the purpose from persons willing to offer tenders for providing the poor of the said parish with bread and flour &c. proposals in writing for entering into a contract for supplying the same in manner hereinafter mentioned. And that such persons should enter into a bond for the due performance of such contract. And whereas in pursuance of such notice the said *John Eagleton* did at the meeting of the said guardians held on the said 16th day of *December* for such purpose as aforesaid send in a tender or proposal in writing for supplying the poor with bread and flour upon and subject to the terms and conditions hereinafter contained which tender was approved and accepted by the said meeting. Now therefore it is agreed by and between

amount, and the money would then be paid to him at the time stipulated in the contract.

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the said parties hereto and the said *John Eagleton* doth in consequence of the payment to be made to him as hereinafter mentioned hereby contract with the said guardians that he the said *John Eagleton* will henceforth until the 25th day of *March* next serve supply and deliver or cause to be delivered to the out door poor at such times and in such manner as the said board of guardians or any person or persons duly authorized by them shall from time to time direct such quantities of bread and flour as shall be required by the said board for the use of the out door poor at and after the rates or prices following that is to say bread made from the best household flour in loaves of three and a half pounds each not having been baked less than twenty-four hours nor more than thirty-six hours before delivery at sevenpence per loaf and best household flour at two shillings and tenpence per stone. And they the said guardians do hereby agree that in case the said *John Eagleton* shall well and truly serve supply and deliver the articles aforesaid to the out door poor aforesaid upon the terms and in manner aforesaid according to the said agreement they the said guardians and their successors shall and will well and truly pay or cause to be paid to the said *John Eagleton* at and after the rates and prices aforesaid during the said term for every quantity of the said articles so to be ordered served supplied and delivered and of which a bill of particulars shall be sent with the said articles at the time of the delivery thereof within two calendar months from the said 25th day of *March* next. Provided

always and it is hereby expressly agreed and particularly by and on the part of the said *John Eagleton* that in case such articles shall not be duly served supplied and delivered by him when and as required by the said board or by such person as shall be duly authorized by them and when delivered shall not in every respect be of the quality and sort contracted for or shall be deficient in the weight stated and charged for in such bill of particulars with such articles or if the same shall be delivered without such bill of particulars they the said board or the person or persons so authorized by them shall be at liberty to return the same at the expence of the said *John Eagleton* or give notice for the same to be sent for and fetched away by him. And that in every such case it shall be lawful for the said board or such person so authorized by them as aforesaid to purchase a fresh supply or employ any other person or persons to serve and supply the said out door poor with bread and flour in such manner as may be required during the period of the said contract or any part of such period in the place of the said *John Eagleton*. And that in such case the said *John Eagleton* his executors and administrators shall bear and make good all costs charges and expences of such additional supply over and above the price at which the same are hereinbefore contracted to be supplied and delivered by the said *John Eagleton*. And also that it shall be lawful for the said board of guardians to retain and apply any sum of money which may be due to the said *John*

1854. These tickets were returned by the defendant to the relieving officer, with the note of the number of loaves, and defendant had credit accordingly.

Eagleton under and by virtue of this agreement at the time of such failure in the performance thereof to the payment of such loss costs damages and expences as the board may incur or be put to by reason thereof. And that notwithstanding the agreement last herein contained for making good the articles which shall not be served supplied and delivered according to the terms hereinbefore agreed on and in pursuance of the said contract it shall be lawful for the board of guardians of the said parish for the time being to put in suit the bond to be given for the performance of this contract of even date herewith against the said *John Eagleton* his executors or administrators. Provided also and it is hereby agreed that if the said poor law commissioners or the said board of guardians with their consent or by their direction should at any time during the term of the said contract be desirous to put an end to the same and shall give five days notice thereof in writing to

the said *John Eagleton* or leave such notice at his usual place of abode or of carrying on business then this present contract or agreement shall thereupon in all respects cease and determine anything herein contained to the contrary thereof in anywise notwithstanding.

Witness the hands of the said parties the day and year first above written.

Witness, *John Eagleton.*
William Willson.

The common seal of
the guardians of the
poor of the parish of
Great Yarmouth was
hereunto duly affixed
at a weekly meeting of
the said board held at
the board room of the
workhouse of the said
parish this 24th day of
February 1854.

In the presence of
W. Willson, clerk to *J. L. Cu-*
pade the clerk to the guar-
dians aforesaid.

BOND.

Know all men by these presents
that I *John Eagleton* of *Great*
Yarmouth in the county of
Norfolk baker am held and
firmly bound to the guardians
of the poor of the parish of
Great Yarmouth in the county
of *Norfolk* and their suc-
cessors in the penal sum of *300L*.
of good and lawful money of
Great Britain and *Ireland* to
be paid to the said guardians
or their successors for which
payment to be well and faith-

fully made I bind myself
my heirs executors and ad-
ministrators and every of them
firmly by these presents sealed
with my seal. Dated the 22nd
day of *December* in the year of
our Lord 1853.

Whereas by a certain contract
or agreement in writing bearing
even date with the above written
obligation and written in the first
two sides of this sheet and made
between the above bounden *John*
Eagleton of the one part and the

It was objected, on the part of the defendant, that no one count set out an offence, and that the evidence did not support any of the first seven counts for fraud, nor the last three, as an attempt to obtain money by false pretences.

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The jury found that the loaves of bread furnished by the defendant were deficient in weight, and were so with the knowledge of the defendant; and that he intended thereby to defraud the out-door poor, for whose relief they had been ordered; and that, in returning the tickets to the relieving officer, he intended to represent that he had delivered the loaves mentioned on them, of the weight stated in the contract, and returned a verdict of guilty.

I have to request the opinion of the Court of Criminal Appeal upon the objections taken on the part of the defendants.

Nathaniel Palmer,
Recorder of the Borough of Great Yarmouth.

The Court, at a sitting holden on the 28th

guardians of the above-named parish of the other part the said *John Eagleton* contracted with the said guardians to serve supply and deliver at the times and places named in the said contract from the date of such contract to the 25th day of *March* next (determinable nevertheless as in the said contract or agreement is mentioned) such quantity of the several articles mentioned therein as shall be required for the use of the said parish of such quality at such times and after the rate and price and subject to such terms provisoies and stipulations as in the said contract or agreement are particularly mentioned and set forth and as on reference thereto will more fully appear. Now the condition

of the above written obligation is such that if the above bounden *John Eagleton* his executors or administrators do and shall well and truly perform fulfil and keep all and every the covenants clauses provisoies terms and stipulations in the said recited contract or agreement mentioned or contained and on his part to be observed performed fulfilled and kept according to the true purport intent and meaning thereof then the above written bond or obligation shall be void or else shall be and remain in full force and virtue.

John Eagleton (L. s.)
Signed sealed and delivered
by the above bounden *John Eagleton* in the presence of
W. Willson.

1854. day of April 1854, having considered that this

EAGLETON'S Case. case should be amended so as to disclose the evidence on which the jury delivered the verdict of guilty upon the last three counts of the indictment, the learned Recorder stated the same to be as follows:—

William Wilson. The attesting witness to the contract and bond, of which copies are annexed to the case.

William Harbert. The relieving officer for the south district, who stated that the out-door poor, who were ordered by the guardians to be relieved by giving them bread, applied to him as relieving officer for a ticket, which he gives in the form set forth in the case, being either for one loaf or two loaves, as ordered. That these tickets are given weekly, and the poor person takes the ticket to the contractor and receives the loaf or loaves, as mentioned upon it. That the contractor, in the ensuing week, returns the tickets to the relieving officer, giving them with a note, stating the number sent, and the contractor is credited in the account with the guardians, with the weight of the bread mentioned on the tickets, and is paid at the time mentioned in the contract. That the loaves delivered to the poor should be each of three and a half pounds weight. That, on the twenty-first day of January, the defendant was the contractor. That witness, on that day, gave to different out-door poor persons thirty-eight tickets, thirty-two being for one loaf, and six for two loaves, each. That *Susanna Godfrey* had a ticket for two loaves, *Elizabeth Bowles* for one, *Ann Parker* for two, and *Elizabeth Fenn* for one loaf, but he could not tell to whom each ticket was delivered. That all the thirty-eight tickets given by the witness, on the twenty-first day of January, were returned to him by the defendant on Monday, the 23rd day of January, with a note in the defendant's writing, stating the number of tickets sent

back, and witness entered them to the credit of defendant's account, in the receipt and expenditure book of the guardians. That, in the evening of the twenty-first day of *January*, he made inquiry of the poor persons to whom he had given tickets as to the weight of the loaves they had received from the defendant, when he found that many of the loaves had been eaten, either in part or wholly, so that the weight could not be ascertained, but that *Susanna Godfrey* had her two loaves, *Elizabeth Bowles* her one, *Ann Parker* one of her two, and *Elizabeth Fenn* her one. That these were all deficient in weight, being weighed by witness, or in his presence.

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Susanna Godfrey. Received a ticket on the twenty-first for two loaves; she sent her son *John* with it to the defendant, and he brought her back two loaves; they were weighed in the evening, and were both short in weight.

John Godfrey. Took the ticket to defendant and gave it to him, and received of him two loaves, which he gave his mother.

Elizabeth Bowles. Took the ticket to defendant and gave it to him, and received one loaf; it was short in weight.

Ann Parker. Received a ticket for two loaves; she sent her son *William* with it to defendant, and he brought her two loaves, which loaves she gave *Harbert* on the *Monday*.

William Parker. Took the ticket to the defendant and gave it to him, and received from him two loaves, which he gave to his mother.

William Christmas Nutman. Relieving officer for the north district delivered twenty-one tickets, on the twenty-first day of *January*, to out-door poor persons for bread; all these twenty-one tickets were returned to witness by the defendant, on the afternoon of the following *Tuesday*, the twenty-fourth, with a note in

1854. the defendant's writing, stating the number of tickets sent back ; he could not tell to whom each ticket was delivered, but *James Mayer*, *John Bowles*, *James Pitt*, and *Edward Campbell*, were among the outdoor poor persons to whom he gave tickets. On the same day he gave an order to *Samuel Lingwood* (who was a casual poor person) upon defendant for two loaves, which were each to weigh three and a half pounds ; that this order was returned to him on the twenty-first day of *January*, a week after defendant had been held to bail to answer a charge of fraud ; this order he knew from *Samuel Lingwood*'s name being written by him, witness, on it. This witness inquired of the poor, to whom he had delivered tickets, as to the bread they had received, and obtained one loaf from *Mayer*, one from *Bowles*, one from *Pitt*, one from *Campbell*, and one from *Lingwood*, being all he could get, and they were all short in weight.

Samuel Lingwood. Took the order to defendant on the twenty-first day of *January*, who gave him two loaves, one he ate, and the other weighed three pounds one ounce only.

John Bowles. Gave the ticket to his wife, *Sarah Bowles*.

Sarah Bowles. Took it to defendant and gave it to him ; he gave her two loaves ; she weighed one, and it was short in weight nearly four ounces, and defendant afterwards gave her three pieces of bread to make up the weight.

James Mayer. Received the ticket from *Nutman* ; took it to defendant and left it with him ; defendant gave him two loaves ; one he ate, and the other he gave to *Nutman*.

Sarah Pitts. Received the ticket of *Nutman*, delivered it to defendant, and she had from him two loaves ; one she ate, the other she gave to *Nutman* ; it was four ounces and three quarters short.

Edward Campbell. Received the ticket of *Nutman* 1854.
and gave it to defendant, and received two loaves, EAGLETON'S
which he gave to *Elizabeth Spanton*, his mother. Case.

Elizabeth Spanton. Gave one of loaves to *Nutman* ; it weighed three pounds four ounces and a half, bare ; the other was eaten.

Nathaniel Palmer,
Recorder of the Borough of *Great Yarmouth*.

This case came on to be argued on 29th April 1854, before POLLOCK C. B., PARKE B., CRESSWELL J., ERLE J., and CROMPTON J.; and being adjourned for the purpose of the case being amended as before mentioned, was again argued on 3rd June 1854, before Lord CAMPBELL C.J., ALDERSON B., COLERIDGE J., MARTIN B., and CROWDER J.

Bulwer appeared for the prosecution.

Bodkin (Mills, J. H., with him) for the defendant.

The first seven counts are similar for the purposes of the present inquiry ; and it is submitted that they disclose no legal offence the subject of indictment at common law. Every species of fraud between individuals is not at common law the subject of a criminal charge, and there are many authorities to support this proposition. The case of *Rex v. Wilders*, 2 East P. C. 216, may be cited as an authority. There a brewer was indicted as a cheat, in selling to one *Hicks*, publican, so many vessels of ale, marked as containing a certain measure, and writing a letter to *Hicks*, assuring him that the vessels did contain that measure, when, in fact, they did not contain it, but a much less quantity. The indictment was quashed on motion, on the ground that it charged no indictable offence. This case is referred to by Lord *Mansfield*, in his judgment in *Rex v. Wheatley*, 2 Burr. 1128, in which case it was held, that delivering less beer than

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Case.

contracted for as the due quantity was not indictable ; and Lord *Mansfield* observed, that it was a mere private imposition or deception, no false weights or measures being used, no false tokens given, and there being no conspiracy, but only an imposition on the person the prisoner was dealing with, in delivering him a less quantity instead of a greater, which the other carelessly accepted ; and that it was, in fact, only a non-performance of a contract, for which an action might be brought. In *Chitt. Crim. Law*, the first edition, I find a precedent of a similar indictment to the present against a baker at *Norwich* ; but in the second edition of Mr. *Chitty's* work that precedent is omitted, it being stated that the facts charged had been held not to constitute an indictable offence.

Lord CAMPBELL C. J.—Is there a report of the case in which it was so held ?

Bodkin. I have not been able to find any. As to the remaining three counts, it is contended that they merely, when taken in connexion with the evidence, disclose an attempt to obtain credit in account, which, in *Rex v. Wavell*, 1 Mood. C. C. 224, was held not to be an indictable offence ; and the same doctrine was held in *Rex v. Crosby*, 1 Cox C. C. 10.

Lord CAMPBELL C. J., after consultation with the other learned Judges, intimated that the case was of such importance to the administration of justice that his learned brothers and himself had come to the conclusion that it had better be adjourned till *Michaelmas* Term, to be argued before the fifteen Judges, and that there could be no objection to this course, as the defendant was out on bail (a).

(a) Although no judgment has been pronounced, it has been thought advisable to report thus much of this important case. The

further arguments of counsel, and the decision of the fifteen Judges, will be found in a later part of the present volume.

REGINA v. HUGH MORGAN and JOHN
MACKEOWAN.

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THE following case was reserved for the opinion of the Court of Criminal Appeal by the Chairman of the General Quarter Sessions of the peace held at *Bourn*, in and for the parts of *Kesteven* in the county of *Lincoln*.

Hugh Morgan and *John Mackeowan* were indicted for that they, on the 29th day of *September* 1854, feloniously did steal certain money of *Jane Jones*, of the monies goods and chattels of the said *Jane Jones*. Upon the trial it was proved that *Jane Jones*, the prosecutrix, lived at *Stoke Hall*, in these parts and county, as laundry maid, and it was also proved by her and *Emily Smith*, her fellow servant, that on the 29th day of *September* 1854, the two prisoners came to *Stoke Hall*; that *Morgan*, who was dressed as a sailor, represented himself to be a Frenchman and unable to speak English, and that *Mackeowan* was his interpreter and would explain. *Mackeowan* explained that *Morgan* was a sea captain, and must sell off his goods that night to get to his ship the next morning. *Morgan* produced and offered the prosecutrix a dress for sale, and signified, through his interpreter, that the price was twenty-five shillings, and if she would give twenty-five shillings for it, he

The prisoners were charged with stealing certain moneys of *Jane Jones*. It appeared that the prisoners, by false representations, induced the prosecutrix to purchase a dress for 25s., promising that if she would do so, they would give her another dress worth 12s. They then took a guinea out of her hand, (she neither consenting nor resisting, but being taken by surprise), and gave her a dress worth much less than a guinea, but refused to give her the dress which they had promised. The jury, upon these

facts, found the prisoners guilty. Held, that the facts warranted the finding, as the Court was bound to assume that the jury were properly directed, and that they found that it was part of the scheme of the prisoners to obtain the money by means of a pretended sale.

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Case.

would give her another dress worth twelve shillings, which he also produced. The prosecutrix agreed, and having one sovereign and one shilling in her pocket she took it out, and whilst holding it in her hand, *Morgan* opened her hand and took the guinea out of it. He did not take it forceably, nor would prosecutrix say that "it was against her will," "nor was it by her consent,"—"he took her by surprise." Prosecutrix then borrowed four shillings of a fellow servant, but *Morgan* refused to take it, "for she had borrowed it," and, addressing the prosecutrix in English, he said she was a bad woman and had told a lie and he should not produce the other dress; he then laid down the dress first offered and packed up the other. Seeing the prisoners about to go away the prosecutrix told the prisoner, *Morgan*, she should send some one after him if he did not produce her dress; he replied she might send for the Devil, and both prisoners went away. The prosecutrix sent to the constable and had both prisoners apprehended in a neighbouring village the same evening. Prosecutrix believed the dress, left by the prisoners, to be of the value of fourteen shillings. *Emily Smith* valued it at nine shillings.

Upon these facts the jury found both prisoners guilty, and they were sentenced to three calendar months' imprisonment in the House of Correction; and bail to appear and receive judgment not having been offered, they are now in prison upon such sentence.

On the part of the prisoners it was contended that no felony was committed by them, that it was a mere breach of contract, that no felonious intent existed in their minds, and that the jury were not warranted, on the foregoing facts, in finding them guilty; and a case was urgently requested.

The question I now most respectfully submit to the Court of her Majesty's Justices of either Bench, and the Barons of the Exchequer, is whether the above facts warrant, in point of law, the finding of the jury in this case ?

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Case.

This case was considered on the 11th of November 1854, by JERVIS C. J., ALDERSON B., COLERIDGE J., MARTIN B., and CROWDER J.

No Counsel appeared either for the Crown or for the prisoners.

JERVIS C. J.—The question for our decision is, whether the facts stated in this case warranted, in point of law, the finding of the jury ? We think they did warrant that finding. The jury having found the prisoners guilty, we are bound to assume that the jury were properly directed by the Chairman, and that they found that it formed part of the scheme of the prisoners that the property was to be obtained by a pretended sale. In that case there was no contract, but only a fraud, by means of which the felony was committed.

Conviction affirmed.

REGINA v. RICHARD CLARKE.

1854.

THE following case was reserved for the opinion of the Court of Criminal Appeal by Mr. Justice CROWDER.

Richard Clarke was tried before me at the York Assizes on the 16th July 1854, on an indictment

The prisoner had carnal knowledge of a married woman under circumstances which induced her to suppose he was her husband.

The jury found that when he entered the bed of the prosecutrix he intended to have connection with her fraudulently, but not by force ; and if detected, to desist. Held, that the prisoner could not be convicted of a rape.

1854. charging him in the usual form with committing a
CLARKE's Case: rape on the person of *Jane Murgatroyd*, the wife of *John Murgatroyd*. It appeared in evidence that *Jane Murgatroyd* went to bed at half-past nine o'clock in the evening, leaving the outer door of her house unfastened, in the expectation of her husband's return home. Having fallen asleep, she was awakened at about half-past two o'clock by a man, whom she believed to be her husband, passing over her and getting into bed on the opposite side from that on which she was lying. She then fell asleep again, and in about ten minutes was awakened by the man in bed with her drawing her towards him, and having connection with her. She assented to the connection in the belief that the man was her husband. She afterwards fell asleep again, and awoke in about twenty minutes, and then first discovered that the man in bed with her was the prisoner at the bar, who, as soon as he found himself detected, jumped out of bed and went away. The jury found the prisoner guilty ; but they found also, that when he entered the bed of *Jane Murgatroyd* he intended to have connection with her fraudulently, but not by force, and, if detected, to desist ; whereupon I respite the judgment, reserving for the opinion of the Court of Criminal Appeal the question whether, upon the above state of facts and finding of the jury, the prisoner is entitled to an acquittal ?

This case was argued on the 11th of November 1854, before JERVIS C. J., ALDERSON B., COLERIDGE J., MARTIN B., and CROWDER J.

Hall R. appeared for the Crown ; no Counsel appeared for the prisoner.

Hall, for the Crown. It is true that it was held by

a majority of the Judges in *Rex v. Jackson* (*a*) that having carnal knowledge of a woman under circumstances which induce her to suppose it is her husband, does not amount to a rape; but four of the twelve Judges who considered that case thought that a carnal knowledge so obtained would be a rape, and though the other eight Judges thought it would not, several of the eight intimated, that if the case should occur again, they would advise the jury to find a special verdict. The facts in that case are not distinguishable from the facts in this; and although the decision in *Rex v. Jackson* has been followed in subsequent cases, the matter is still, I apprehend, open for argument, and I contend that the consent of the prosecutrix was not to the connection with the prisoner, but to a connection with her husband. She submitted to what she supposed to be the exercise of a legal right, and the prisoner cannot be allowed to take advantage of his own fraud.

JERVIS C. J.—We have conferred with several of the other Judges, and we think we cannot permit this question to be opened now, but are bound by the decision in *Rex v. Jackson*.

The other learned Judges concurred.

Conviction quashed.

(*a*) Russ. & Ry. 487.

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Case.

1854.

REGINA v. GEORGE HOBSON.

A. was indicted for feloniously receiving a watch and a hat. It was proved that a policeman, in consequence of information received from *B.* (the thief), went to a room in a lodging house where the prisoner slept, and in a box in that room found the hat. The prisoner admitted that the hat had been brought there by *B.*, but denied all knowledge of the watch. On the following day *A.* was taken into custody, and he then told the policeman that he knew where the watch was, but did not like to say

anything about it before the people of the house. *A.* then took the policeman to a place where he said the watch was but it was not found there, but he afterwards sent a boy for the watch, and on the boy bringing the watch to the prisoner he gave it to the policeman. Held, that there was sufficient evidence to go to the jury.

THE Chairman of the General Quarter Sessions of the Peace for the West Riding of the county of York, reserved the following case for the opinion of the Court of Criminal Appeal.

The prisoner, *George Hobson*, was tried at the West Riding Quarter Sessions held at *Rotheram* on the 30th June 1854, upon a charge of feloniously receiving from *William Levick*, one watch, one hat, and one shilling, the property of *James Birkenshaw*, and was found guilty and sentenced to be imprisoned and kept to hard labour in the House of Correction at *Wakefield* for twelve calendar months. *William Levick* had previously at the same sessions pleaded guilty to the theft. Upon the trial *William Laughton*, a policeman proved that on the 8th day of June 1854 he went to the prisoner's house in consequence of something he had heard from *William Levick*, the party charged in the indictment as the thief—that *Lewick* took witness there—that witness asked the prisoner, who was in bed, if *Lewick* had brought a hat there—that the prisoner said "Yes"—that the prisoner then got out of bed and took the hat out of a box in a corner of the room, and gave the hat to witness—that witness asked the prisoner if he knew

anything about the watch—that the prisoner said he did not—that witness went the next day to the prisoner's house and took him into custody—that witness told the prisoner that he (witness) would most likely trace the watch and who had it—that when witness and the prisoner got outside the house, the prisoner said he did not like to say anything about the watch before the folks in the house, but he knew where it was, that it was planted, that it was at Mr. *Wastenholmes*—that witness and the prisoner went to Mr. *Wastenholmes*, but could not find a watch there—that the prisoner then called for a boy and asked him to get the watch—that the watch was afterwards brought by the boy to the prisoner, who gave it to witness. On cross-examination, the witness said that the house where the prisoner lived was a lodging-house—that witness did not know whether the thief (*Levick*) lived there or not, or whether or not the prisoner had exclusive possession of the room where the hat was found—that witness did not notice how many beds were in the room where the hat was found—that when the prisoner said he knew nothing about the watch, there were several people in the house standing round him. It was objected by the prisoner's Counsel that there was no evidence to go to the jury; first, as to the hat, because there was not sufficient evidence of the prisoner's possession of it, the house where the hat was found being a lodging-house, and the prisoner having no exclusive possession of the room; secondly, as to the watch, because the prisoner was not shewn to have had possession of it—all the evidence was, that the prisoner knew where the watch was. The Court overruled the objection, being of opinion that there was sufficient evidence to go to the jury, but granted a case for the opinion of the Judges. -

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HOBSON'S
Case.

1854. This case was considered on the 11th of November 1854, by JERVIS C. J., ALDERSON B., COLE-RIDGE J., MARTIN B., and CROWDER J.
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No Counsel appeared either for the Crown or for the prisoner.

JERVIS C. J.—We all think that in this case there was evidence to go to the jury.

Conviction affirmed.

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REGINA v. CATHERINE WEST.

The prisoner was indicted for stealing a purse and its contents. A purchaser at the prisoner's stall left his purse on it. The prisoner's attention was called to the purse by another person, and she treated it as her own and put it in her pocket, and afterwards concealed it.

THE following case was reserved for the opinion of the Court of Criminal Appeal, by *J. Hildyard Esq.* the Recorder of the borough of *Leicester*.

Catherine West, the prisoner in this case, was tried before me at the Quarter Sessions of the peace, for the said borough, held *Midsummer 1854*, upon an indictment for simple larceny, in having feloniously stolen on the 27th day of *May* last, at the parish of *Saint Martin* in the said borough, one purse, five sovereigns, ten half sovereigns, eight half crowns, twenty shillings, and forty sixpences, the goods, chattels and moneys of *William Evatt*.

The prosecutor returned to the stall and asked the prisoner about the purse, but she denied all knowledge of it. The jury found that the prisoner took up the purse knowing it was not her own and intending to appropriate it her own use; but that she did not know who was the owner of the purse at the time she so took it. On this finding a verdict of guilty was recorded. *Held*, that the conviction was right inasmuch as the property was not lost property, but property mislaid under circumstances which would enable the owner to know where to find it, and that, therefore, it was unnecessary to inquire whether the prisoner, when she took the purse, reasonably believed that the owner could not be found.

The prosecutor in making a purchase left his purse on the prisoner's stall, in *Leicester* market, unperceived by either of them. A stranger pointed it out to the prisoner and (supposing it to be her own) reproved her carelessness. She put the purse into her pocket and replied, "Yes, it is a wonder it was not gone before this." She took an early opportunity to conceal the purse, and, on the prosecutor returning to search for it, denied all knowledge of it. The Counsel for the prisoner relied upon *Reg. v. Preston*, 21 Law Journal, N. S., M. C. 41 (*a*), and *Reg. v. Thurborn*, 1 Den. C. Cas. 387. I put two questions to the jury: First. Did the prisoner take up the purse knowing that it was not her own, and intend at that time to appropriate it to her own use? Secondly. Did the prisoner know who was the owner of the purse at the time she so took it? The jury answered the former question in the affirmative, and the latter in the negative; and I thereupon directed a verdict of guilty against the prisoner to be recorded. I reserved a case for the opinion of the Court of Criminal Appeal, whether under the circumstances above stated the prisoner was properly convicted. The judgment upon the conviction was postponed, and the prisoner was discharged upon recognizance of bail, to appear and receive judgment at the Sessions, next after this case should be heard and decided.

This case was considered on the 11th of November 1854, by JERVIS C. J., ALDERSON B., COLERIDGE J., MARTIN B., and CROWDER J.

No Counsel appeared either for the Crown or for the prisoner.

JERVIS C. J.—The question is whether under the

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circumstances stated in this case, the prisoner was properly convicted of larceny, and we are all of opinion that she was properly convicted. The prisoner keeps a stall in the *Leicester* market. The prosecutor went to that stall, left his purse there and went away. The purse was pointed out to the prisoner by another person, and she then put it in her pocket, and treated it as her own, and on the prosecutor returning to the stall and asking for the purse, she denied all knowledge of it. Two questions were left to the jury, first, did the prisoner take the purse knowing that it was not her own, and intending to appropriate it to her own use? This the jury said she did. Secondly, did the prisoner then know who was the owner of the purse? This the jury said she did not. If there had been any evidence that the purse and its contents were lost property, properly so speaking, and the jury had so found, the jury ought further to have been asked whether the prisoner had reasonable means of finding the owner, or reasonably believed that the owner could not be found; but there is in this case no reason for supposing that the property was lost at all, or that the prisoner thought it was lost. On the contrary, the owner having left it at the stall, would naturally return there for it when he missed it.

There is a clear distinction between property lost and property merely mislaid, put down and left by mistake as in this case, under circumstances which would enable the owner to know the place where he had left it, and to which he would naturally return for it. The question as to possession by finding, therefore does not arise.

The other learned Judges concurred.

Conviction affirmed.

REGINA v. JAMES BEESTON.

1854.

THE following case was reserved for the opinion of the Court of Criminal Appeal by Mr. Justice CROMPTON.

James Beeston was tried before me at the last *Stafford* Assizes on an indictment for the murder, and on the coroner's inquisition for the manslaughter, of *James Arkinstall*. The prisoner had caused the death of the deceased by striking him on the head with a hammer; and between the blow and the death the examination and deposition of the deceased had been duly taken before a justice of the peace, in the presence of the accused, on the charge mentioned in the heading of the deposition, which was, "For that he, the said *James Beeston*, on &c., at &c., did unlawfully, maliciously and feloniously, with a certain hammer, wound the said *James Arkinstall*, with intent then and there to do some grievous bodily harm to the said *James Arkinstall*, contrary to the form of the statute," &c. The Counsel for the prosecution offered in evidence the deposition so taken; and the Counsel for the prisoner objected to its being received in evidence, on the ground that the deposition was not taken on the same charge for which the prisoner was on his trial, and that the prosecution in which the trial was taking place was not the same prosecution as that in which the deposition had been taken, within the words

The prisoner was charged before a magistrate with feloniously wounding *A.* with intent to do him grievous bodily harm, and the deposition of *A.* was taken under 11 & 12 Vict. c. 42, s. 17.

A. subsequently died of the wound, and the prisoner was indicted for his murder.

Held, that on the trial of the prisoner for the murder the deposition of *A.* might be read in evidence; as, although the deposition was not taken on the same technical charge as that for which the prisoner was indicted, it was in fact the same case, and the prisoner had had full op-

portunity for cross-examination.

Sembler, that if the charge on the two occasions had been substantially different the deposition would not have been admissible.

1854. of the statute 11 & 12 Vict. c. 42, s. 17 (a), "in such prosecution;" which, he contended, only allows such a deposition to be read on a trial for the very same offence with which the prisoner is charged when the deposition is taken: and he relied on the case of *Regina v. Ledbetter*, 3 Car. & Kir. 108. I thought it best to take the course adopted in the case of *Regina v. Dilmore*, 6 Cox Cr. C. 52, and received the deposition in evidence. The prisoner was convicted and sentenced to fifteen years' transportation; but I now state this case for the opinion of the Court of Criminal Appeal; the question being, "Whether the deposition

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(a) The section referred to is as follows: "That in all cases where any person shall appear or be brought before any justice or justices of the peace charged with any indictable offence, whether committed in *England* or *Wales* or upon the high seas or on land beyond the sea, or whether such person appear voluntarily upon summons or have been apprehended with or without warrant or be in custody for the same or any other offence, such justice or justices before he or they shall commit such accused person to prison for trial, or before he or they shall admit him to bail, shall in the presence of such accused person, who shall be at liberty to put questions to any witness produced against him, take the statement on oath or affirmation of those who shall know the facts and circumstances of the case, and shall put the same into writing, and such depositions shall be read over to and signed respectively by the witnesses who shall have been so examined, and shall be signed also by the justice or justices taking the

same; and the justice or justices before whom any such witness shall appear to be examined as aforesaid, shall before such witness is examined administer to such witness the usual oath or affirmation which such justice or justices shall have full power and authority to do; and if upon the trial of the person so accused as first aforesaid it shall be proved by the oath or affirmation of any credible witness that any person whose deposition shall have been taken as aforesaid is dead or so ill as not to be able to travel, and if it also be proved that such deposition was taken in the presence of the person so accused, and that he or his counsel or attorney had a full opportunity of cross-examining the witness, then if such deposition purport to be signed by the justice by or before whom the same purports to have been taken, it shall be lawful to read such deposition as evidence in such prosecution without further proof thereof, unless it shall be proved that such deposition was not in fact signed by the justice purporting to sign the same."

taken on the charge of maliciously wounding, with intent &c., was properly received in evidence?"

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Case.

This case was argued on the 11th of November 1854, before JERVIS C.J., ALDERSON B., COLERIDGE J., MARTIN B. and CROWDER J.

Scotland appeared for the Crown, and *Huddleston* for the prisoner.

Huddleston, for the prisoner. First, the deposition was not admissible independently of the statute 11 & 12 Vict. c. 42, s. 17 ; and, secondly, it was not admissible by force of the provisions of that statute. The same question which arises in this case was argued before *Greaves* Q. C. in *Reg. v. Ledbetter and Others* (*a*) ; and the deposition was, in that case, held to be inadmissible.

JERVIS C. J.—I thought the deposition was clearly admissible before the statute.

Huddleston. I submit not, and that the statute is merely declaratory of the common law. In *Rex v. Smith* (*b*), which was before the statute, a deposition taken on a charge of assault and robbery, was tendered on the trial of the prisoner for murder, and was received ; but although a majority of the Judges afterwards held that it was properly received, several of the Judges said that they should have doubted except for the previous decision in *Rex v. Radbourne* (*c*), where the deposition of a woman who had been severely wounded, taken in the presence of the person accused of such wounding, was held admissible in evidence against the same person on his trial for murder. This case was before the recent statute, and it was contended that the deposition was admissible

(*a*) 3 Car. & Kir. 108.(*b*) Russ. & R. 339.(*c*) 1 Leach C. C. 457.

1854. under the statutes of Philip and Mary, but it does not appear from the case whether the Judges held it to be admissible on that ground, or as a dying declaration. The case of *Reg. v. Ledbetter* (*a*) is since the statute 11 & 12 Vict. c. 42, and the judgment of Mr. *Greaves* in that case was given after consulting Lord CAMPBELL C. J. and WILLIAMS J. There the indictment was for feloniously wounding, and the deposition, which had been taken on a charge of assault, was rejected, although on both charges the transaction was the same, on the ground that the prisoner might not have had a full opportunity of cross-examination.

ALDERSON B.—In *Rex v. Smith*, in the absence of the prisoner, part of the deposition of the witness was taken and written down. The prisoner was then called in, and what had been previously taken down was read over to the witness in the prisoner's presence, and the witness was asked if it was true, and then the examination went on. I was Counsel for the prisoner, and I contended, on the authority of *Rex v. Forbes* (*b*), that the deposition was not admissible, as the prisoner had not a sufficient opportunity of cross-examination ; that he had no opportunity of hearing the witness give his answers, and seeing his manner of answering ; and that so much of the evidence as had been taken in the prisoner's absence was inadmissible ; and I still think I was right in that objection.

Huddleston. In this case, questions which the prisoner might have put relevant to the charge of murder, might possibly have been stopped by the justice as irrelevant to the charge of wounding. The words of the statute, “in such prosecution,” only

enable the depositions to be read on a trial for the very same offence as that with which the prisoner was charged before the justice ; and in this case the charge before the justices was for wounding only, and the indictment on the trial was for murder.

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ALDERSON B.—Can you suggest any question material on the one charge and not on the other ?

Huddleston. In the present instance it may be difficult to do so, but such a case might easily occur. There are questions which arise on a charge of murder or manslaughter only, such as whether the wound inflicted was the cause of death, which although very material on a charge of murder, would be immaterial on a charge of wounding only. Suppose a prisoner before a justice on a charge of wounding, wished to direct attention to something connected with the health of the person wounded, and to cross-examine as to whether he was subject to some internal disease. The magistrate might say here is a man wounded in the arm, and you are charged with wounding him, you must not ask if the man has been subject to erysipelas, for that question is not relevant to the wounding ; and yet if erysipelas ensued, and the man died, it might on the charge of murder be most material to know whether the erysipelas was caused by the wounding, or by the suggested internal disease ; and yet upon that part of the case, the prisoner would not have had the full opportunity of cross-examination. The words of the statute clearly import that the depositions are only to be admissible on the same technical charge ; and before the statute, it was decided in *Melen v. Andrews* (a), that even when a party had an opportunity of cross-examination, a de-

(a) Moo. & Mal. 336. See also 33 ; *Finden v. Westlake*, Moo. & R. v. *Appleby*, 2 Stark. N. P. C. Mal. 461.

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position was not admissible when taken in a different judicial inquiry. In that case PARKE J. says, "I think it is the safer course to hold that the deposition of a witness taken in a judicial proceeding is not evidence, on the ground that the party against whom it is sought to be read was present, and had the opportunity of cross-examination. It clearly would not be evidence against a third person who merely happened to be present, and who being a stranger to the matter under consideration, had not the right of interfering, and I think the same rule must apply here. It is true that the plaintiff might have cross-examined or commented on the testimony ; but still on an investigation of this nature, there is a regularity of proceeding adopted, which prevents the party from interposing when and how he pleases, as he would in a common conversation. The same inferences therefore, cannot be drawn from his silence or his conduct in this case, which generally may in that of a conversation in his presence ; and as it is only for the sake of these inferences that the conversation can ever be admitted, I think it better to refuse the evidence now offered." This decision was afterwards referred to, and not disapproved in *Finden v. Westlake* (a).

JERVIS C. J.—Would a deposition taken before a coroner, be admissible on a subsequent trial for murder ?

Huddleston. PARKE J. A. J. refused to receive such a deposition in *Rex v. Wall* (b). I submit that

(a) Moo. & M. 464.

(b) 2 Greaves' Russ. 893. The reasons why such a deposition would not be admissible are thus given in the following note by the learned editor : "The ground on which a deposition before a magis-

trate is admissible is, that the prisoner, being there to answer a charge, has the right to cross-examine the witnesses. In many cases before coroners, even if the prisoner be present there is no charge, and perhaps no suspicion against him,

neither without the statute nor with its aid was this deposition admissible. Persons when before magistrates frequently do not, through ignorance and fear, know what questions they may legally put to the witnesses ; and before a deposition can be admissible against a prisoner on his trial, it must at all events be shown, that when it was taken he had the fullest opportunity of cross-examination.

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Scotland, for the Crown, was not called upon.

JERVIS C. J.—We are unanimously of opinion that this deposition was under the circumstances admissible in evidence against the prisoner. Notwithstanding the decision in *Reg. v. Ledbetter* (*a*), it is quite clear that before the passing of the 11 & 12 Vict. c. 42, the deposition would have been admissible, and on this point the cases are all one way. In *Rex v. Radbourne* (*b*), the deposition of a deceased person was read on a trial for the murder of that person, and the decision in that case was acted upon in *Rex v. Smith* (*c*). There, upon a trial for murder, the deposition of the deceased before a magistrate on a charge of assault against the prisoner was received in evidence, and upon a question submitted for the consideration of the Judges, ten of the eleven Judges who met and considered the case held that the deposition had been properly received in evidence. It is true, that in that case some of the Judges seem at first to have doubted as to the admissibility of the evidence ; but they might well have done so without reference to the question now under discussion, for it is quite possible they might have thought that the prisoner had not in that

and it may be doubted whether in strictness under any circumstances he has a *right* to cross-examine the witnesses ; and if there were no charge in fact made against him his interference would be an

unwarranted interruption of the proceedings.”

(*a*) 3 Car. & Kir. 108.

(*b*) 1 Leach C. C. 408.

(*c*) Russ. & Ry. C. C. R. 339 ; S. C. 2 Stark. N. P. C. 208.

1854. case had sufficient means of cross-examination ; but be this as it may, the Judges at all events held themselves bound by the previous decision in *Rex v. Radbourne*, and there is no reason why we, fortified as we are by a second decision, should depart from the convenient rule of abiding by decided cases ; therefore, independently of the statute, we think that the deposition in this case would have been admissible, and there is nothing in the statute (a) to render it inadmissible, or to restrict the rule which had been established by practice since the statutes of *Philip & Mary* (b). The statute (a) provides, that if upon the trial of "the person so accused as first aforesaid," that is, accused of or charged with "any indictable offence," it is proved that any person whose deposition shall have been taken in the manner previously pointed out is dead, and that such deposition was taken in the presence of the person "so accused," and that he or his counsel or attorney had a full opportunity of cross-examining the witness, then if such deposition purport to be signed by the justice by or before whom the same purports to have been taken, it shall be lawful to read it in evidence in such prosecution. This enactment has not altered the previously existing rule, but has added a different class of cases in which depositions are to be admissible, and has introduced in terms the principle that the prisoner should have the full opportunity of cross-examination, which he formerly had only by the equitable construction of the law.

The Legislature has provided, that the person against whom the deposition shall be received in evidence, shall be a person charged with "an indictable offence,"

(a) 11 & 12 Vict. c. 42, s. 17, *ante*, p. 406.

(b) 1 & 2 P. & M. c. 13, and 2 & 3 P. & M. c. 10.

that the persons whose evidence is to be taken shall be "those who shall know the facts and circumstances *of the case*," not of the particular technical charge on which he is afterwards tried; and then it says, that if the witness be dead the deposition may be admissible "on *the trial* of the person so accused," not on his trial for the particular offence with which he was charged before the magistrate; and though the charge at the trial be not identically the same as that made when the deposition was taken, no harm can result from holding it admissible, because it would always be matter for enquiry by the Judge trying the case, whether the prisoner had had a full opportunity for cross-examination, if the charge on which the deposition was taken was not identical with that stated in the indictment. We ought not to restrict the operation of this salutary statute; but I do not mean to say that a deposition would be admissible if the charges on the two occasions were substantially different.

ALDERSON B.—I agree in the opinion expressed by the Lord Chief Justice. The question is not whether the charge made on the enquiry before the magistrate was exactly the same as that made on the trial, but whether the enquiry was such as afforded to the party accused the full opportunity of examination. In *Reg. v. Ledbetter*, it might very well have been that a full opportunity of cross-examination was not afforded, and I therefore do not say whether Mr. Greaves was or was not wrong in rejecting the deposition in that case. On a charge for a common assault, the wounding subsequently charged in an indictment might not have been material; but here the whole of the circumstances which came before the Court at the trial were before the magistrate, with the single exception of the death of the deceased; and the prisoner's oppor-

1854.

BEESTON'S
Case.

1854.
BEESTON'S Case. tunity of cross-examining was so complete, that Mr. *Huddleston's* ingenuity could not suggest a question in the one enquiry which would not have been so on the other. If the construction we are now putting on the statute be not the true one, the deposition of a living man taken before a magistrate could in no case be used against the prisoner after the death of the witness on an inquiry respecting such death.

COLERIDGE J.—I am of the same opinion, and have nothing to add except that if we decided the other way the provisions of the statute would be altogether useless in all cases of manslaughter or murder, where death ensued subsequently to the taking of the depositions.

MARTIN B.—I also agree with the rest of the Court. The deposition in this case was clearly admissible at the common law, and our decision is in accordance with the cases of *Rex v. Radbourne*, and *Rex v. Smith*. The statute was not intended to restrict the operation of the common law; but I am clearly of opinion that upon the language of the statute itself the deposition was admissible. It is quite a mistake to suppose that the words "as evidence in such prosecution" necessarily mean "on the same identical charge."

CROWDER J.—I am also of opinion that the deposition was admissible in evidence at common law, and under the statute. The object of the statute was rather to extend the operation of the common law than to restrict it.

Conviction confirmed.

REGINA *v.* HENRY SHARPE, GEORGE
CHARLES and HENRY BROWN.

1854.

THE following case was reserved for the opinion of the Court of Criminal Appeal by Mr. Serjeant Adams the assistant Judge of the *Middlesex* Sessions.

Henry Sharpe and *George Charles* were indicted at the *Middlesex October Quarter Sessions* 1854, held at *Clerkenwell*, and tried, before me, for stealing a quantity of oats and beans, the property of their employers the Great Northern Railway Company, and *Henry Brown* was indicted for feloniously receiving the same.

It appeared in evidence that the two prisoners *Sharpe* and *Charles* were carmen of the company, and that on the morning of the 18th of *September* they left the Great Northern Station, in the county of *Middlesex*, with a waggon belonging to the Company, with directions to proceed with it to *Woolwich*, in the county of *Kent*, and that before they started the usual quantity of oats and beans and chaff, for provender for the horses, was given out to them and put into the waggon in nosebags. It was then proved that, on the arrival of the waggon at the *Antigallican* Public House in *Woolwich*, the two prisoners, *Sharpe* and *Charles*, took the nosebags from the waggon and delivered them, with their contents, to the prisoner *Henry Brown*, who was the ostler at the said public house, and that he gave them sixpence for the same. The jury found all the prisoners guilty, and they were

The 13th section of the statute 7 Geo. 4, c. 64, is not confined in its operation to the carriages of common carriers or to public conveyances; but if property is stolen from any carriage employed in any journey, the offender may, by virtue of that section, be tried in any county through any part whereof such carriage shall have passed in the course of the journey during which such offence shall have been committed.

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SHARPE'S
Case.

sentenced respectively to different terms of imprisonment, and committed to the House of Correction at *Coldbath Fields*, to abide the decision of the Criminal Court of Appeal upon the point reserved for its consideration ; that point being, whether the case falls within the provisions of the statute 7 *Geo. 4*, c. 64, s. 13.

This case was argued on the 11th of November 1854, before JERVIS C. J., ALDERSON B., COLERIDGE J., MARTIN B. and CROWDER J.

No Counsel appeared for the Crown. *Parry* appeared for the prisoners.

Parry, for the prisoners. This is entirely a question of venue, and the point to be decided is whether, under the circumstances stated, the Judge had jurisdiction to try the case. No doubt the prisoners ought to have been tried in the county of *Kent*, the county in which the offence was committed, unless the 13th section of the statute 7 *Geo. 4*, c. 64 applies, and I have to submit that that enactment is limited to public conveyances and the carriages of common carriers. I can find no authority upon the point, but the section enacts, "that where any felony, or misdemeanor shall be committed on any person or on or in respect of any property in or upon (a) any coach, waggon, cart or other carriage whatever employed in any journey, or shall be committed on any person or on or in respect of any property on board any vessel whatever employed on any voyage or journey upon any navigable river, canal or inland navigation, such felony or misdemeanor may be dealt with, inquired of, tried, determined and punished in any county through any part whereof such coach, waggon, cart,

(a) As to the effect of the words "in or upon" in this section, see *Rex v. Sharpe*, 2 Lewin, 233.

carriage or vessel shall have passed in the course of the journey or voyage during which such felony or misdemeanor shall have been committed, in the same manner as if it had been actually committed in such county." If the waggon, in this case, was "employed" in a journey within the meaning of this section, no doubt the prisoners were properly tried in *Middlesex*, but I submit that the enactment was only intended to apply to carriers and to public conveyances, and that the prisoners ought to have been tried in the county of *Kent*.

1854.

SHARPE'S
Case.

JERVIS C. J.—The enactment is general, and applies to any carriage whatever employed in any journey. The object of the statute was to enable a prosecutor, whose property is stolen from any carriage on a journey, to prosecute in any county through any part of which the carriage shall have passed in the course of that journey; because, in many cases, it might be quite impossible for a prosecutor to ascertain at what part of the journey the offence was actually committed.

The other learned Judges concurred.

Conviction affirmed.

1854.

REGINA v. JOHN ROBINS.

A quantity of wheat was in the possession of the prosecutors as bailees, and was deposited in one of their storehouses, under the care of one of their servants, who had authority to deliver it only on the order of the prosecutors or their managing clerk. The prisoner, who was also a servant of the prosecutors, by a false statement, induced the servant, under whose care the wheat was, to allow him to remove part of the wheat, which he carried away and appropriated to his own use. Held, that under these circumstances the prisoner was properly convicted of larceny.

THE following case was reserved for the opinion of the Court of Criminal Appeal, by *W. H. Bodkin Esq.*, sitting for the assistant Judge of the *Middlesex Sessions*.

John Robins was tried at the *Middlesex Sessions*, in *September 1854*, upon an indictment which charged him with stealing five quarters of wheat the property of his masters, *George Swayne* and another.

The wheat in question was not the property of the prosecutors, but part of a large quantity consigned to their care and deposited at one of their storehouses. This storehouse was in the care of *Thomas Eastwick*, a servant of the prosecutors, who had authority to deliver the wheat only on the orders of the prosecutors, or of a person named *Callow*, who was their managing clerk.

It was proved that on the 24th of *June* the prisoner, who was a servant of the prosecutors, at another storehouse, came to the storehouse in question accompanied by a man with a horse and cart, and obtained the key of the storehouse from *Eastwick* by representing that he, the prisoner, had been sent by the managing clerk *Callow* for five quarters of wheat, which he was to carry to the *Brighton Railway*. *Eastwick*, knowing the prisoner, and believing his statement, allowed the wheat to be removed, the prisoner assisting to put it into the cart in which it was conveyed, from the prosecutors' premises, the prisoner going with it. It was also proved that *Callow* had given no such authority, the prisoner's statement

being entirely false, and that the wheat was not taken to the *Brighton Railway*, but disposed of, with the privity of the prisoner, by other parties who had been associated with him in the commission of the offence.

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ROBINS'S
Case.

The Counsel for the prisoner contended that the wheat was obtained by false pretences, but the jury were directed, if they believed the facts, that the offence amounted to larceny, and they found the prisoner guilty of that offence. The prisoner was sentenced to twelve months' imprisonment, and is now confined in the House of Correction at *Coldbath Fields* in execution of that sentence. I have to ask this Honourable Court, whether the verdict was right in point of law ?

This case was argued on the 11th of November 1854, before JERVIS C. J., ALDERSON B., COLERIDGE J., MARTIN B. and CROWDER J.

Sleigh appeared for the Crown, and *Metcalfe* for the prisoner.

Metcalfe, for the prisoner. In this case the prisoner obtained the wheat by means of a false pretence, and was not guilty of larceny. The general rule is, that in larceny the property is not parted with, and in false pretences it is. Here the prosecutor parted with the property in the wheat.

ALDERSON B.—It was delivered to the prisoner for a special purpose, namely, to be taken to the *Brighton Railway*.

JERVIS C. J.—He gets the key by a false pretence, and commits a larceny of the wheat.

Metcalfe. *Eastwick* had the sole charge of the wheat; and although it was not delivered to the prisoner by the hand of the master, the delivery by *Eastwick* must be taken to be a delivery by the

1854. master. The decision in *Regina v. Barnes* (*a*) is in favour of this proposition. There the chief clerk of the prisoner's master, on the production by the prisoner of a ticket, containing a statement of a purchase which, if it had been made, would have entitled the prisoner to receive 2s. 3d., but which purchase had not in fact been made, paid the prisoner the 2s. 3d., and it was held that the prisoner was not indictable for larceny, but for obtaining money under false pretences.

ALDERSON B.—That is simply the case of one servant being induced to give the property of the master to another servant by means of a false pretence; but here the property remained in *Swaine* throughout as bailee. Suppose the prisoner had been really sent by *Callow*, and had not been guilty of any fraud, but on his way to the railway had been robbed of the wheat, could not the wheat have been laid in *Swaine*?

Metcalf. *Swaine* was the bailee of the consignor; he had only a special property, and that special property he parted with to the prisoner.

MARTIN B.—For the purposes of this case *Swaine* was the owner of the wheat.

ALDERSON B.—If the prisoner had told the truth, and, having obtained the wheat without making any false pretence, had subsequently dealt with it as he has done, he would, without doubt, be guilty of larceny; and can it be said that he is not guilty of larceny, simply because he told a falsehood?

Sleigh, for the Crown, was not called upon.

Conviction affirmed.

REGINA v. WILLIAM SIMPSON.

1854.

THE following case was reserved for the opinion of the Court of Criminal Appeal by *W. H. Bodkin Esq.*, acting as assistant Judge of the *Middlesex* Sessions.

William Simpson was tried before me at the Sessions of the Peace for the county of *Middlesex*, in *July 1854*, upon an indictment which charged him with having stolen from the person of *Michael Mapper* a gold watch and chain, his property. The watch was carried by the prosecutor in the pocket of his waistcoat, and the chain, which was at one end attached to the watch, was at the other end passed through the button-hole of his waistcoat, where it was kept by a watch key, turned so as to prevent the chain slipping through. The prisoner took the watch out of the prosecutor's pocket, and forcibly drew the chain out of the button-hole ; but his hand was seized by the prosecutor's wife : and it then appeared that, although the chain and watch key had been drawn out of the button-hole, the point of the key had caught upon another button, and was thereby suspended. It was contended for the prisoner that he was guilty of an attempt only ; but I thought that, as the chain had been removed from the button-hole, the felony was complete, notwithstanding its subsequent detention by its contact with the other button. The jury found the prisoner guilty of the felony, and, a former conviction having been proved,

mained there suspended. *Held*, that the prisoner was properly convicted of stealing the watch and chain from the person of the prosecutor.

The prisoner was indicted for stealing from the person. It appeared that the prosecutor carried his watch in his waistcoat pocket fastened to a chain, which was passed through a button-hole of the waist-coat and kept there by a watch key at the other end of the chain, so turned as to prevent the chain from slipping out. The prisoner took the watch out of the pocket and forcibly drew the chain and key out of the button-hole ; but the point of the key caught upon a button, and the prisoner's hand being seized the watch re-

1854.

**SIMPSON's
Case.**

he was sentenced to penal servitude for four years. The execution of the sentence was respite, and the prisoner was committed to the House of Correction, *Coldbath Fields*, where he now is. I have to pray the judgment of this Honourable Court, whether the facts above stated justify the conviction in point of law ?

This case was argued on the 11th of November 1854, before JERVIS C. J., ALDERSON B., COLERIDGE J., MARTIN B. and CROWDER J.

Payne appeared for the Crown, and *Parry* for the prisoners.

Parry, for the prisoner. The conviction was wrong. There may have been a simple larceny, but the asportation was not sufficient to warrant a conviction for stealing from the person. The watch chain, though drawn out of the button-hole, caught on the button, and the property never was entirely severed from the prosecutor's person.

ALDERSON B.—Whilst it was between the button and the button-hole, where was it?

Parry. It was about the person of the prosecutor. The watch always remained about his person, and its ultimate condition was that it was suspended from the button—it never was finally and entirely removed from the person of the prosecutor. In *Rex v. Wilkinson* (*a*), where a thief took, from the pocket of the owner, a purse, to the strings of which some keys were tied, and was apprehended with the purse in her hand, but still hanging by means of the keys to the pocket of the owner, it was ruled not to be larceny, for the prosecutor had still, in law, the possession of the purse, and *licet cepit non asportavit*.

COLERIDGE J.—In that case there never was a

(a) 1 Hale P. C. 508, 40 Eliz., cited M. 8 Jac. C. B.

severance, here there was, and the case expressly speaks of the "subsequent detention" of the chain.

1854.

SIMPSON'S
Case.

Parry. It is not necessary for me to go so far as that case, because it may be conceded that, in this case, there was a sufficient asportation to support a charge of simple larceny.

ALDERSON B.—The nearest case to the present one seems to be *Rex v. Thompson* (*a*).

Parry. In that case a pocket-book was drawn by the prisoner out of the owner's inside coat pocket, and lifted one inch above the top of the pocket, and then the hand of the thief being caught, it fell back into the pocket; and, though all the Judges held it larceny, they were divided whether it was a stealing from the person, as the pocket-book remained about the person of the owner; and the majority of the Judges held that it was not.

ALDERSON B.—How do you distinguish this case from *Rex v. Lapier* (*b*), in which the ear-ring was torn from a lady's ear and fell upon her curl?

Parry. There the forcing it from her ear was a severance from her person, but I contend that in this case there was no actual severance. There is a case of *Rex v. Farrell* (*c*), where it appeared that the prisoner stopped the prosecutor as he was carrying a feather bed on his shoulders, and told him to lay it down or he would shoot him, and the prosecutor accordingly laid the bed on the ground, but the prisoner was apprehended before he could remove it from the spot where it lay; and the Judges were of opinion that the offence of robbery was not completed. All the cases shew the wide distinction between a simple larceny and a stealing from the person. The distinction is one which ought to be considered strictly

(*a*) 1 Ry. & Moo. 78. (*b*) 1 Leach C. C. 60. 320)
 (*c*) 1 Leach C. C. 362. 322

1854. in favour of a prisoner, and although this case may be on the very confines of a severance, I contend that no actual severance ever took place.

SIMPSON's Case.

Payne, for the Crown, was not called upon.

JERVIS C. J.—We are all of opinion that the conviction was right. This case is in no respect like that mentioned by Lord *Hale*, where the prisoner took the purse attached by its strings to the keys which were entangled in the pocket of the prosecutor; in that case there was at no moment the slightest severance from the person; but this is precisely similar to *Lapier*'s case, in which the jewel was torn from the ear of the prosecutrix, and dropped amongst her curls. The ear in *Lapier*'s case is like the button-hole in this, and the curl is like the button below. The watch was no doubt temporarily, though but for one moment, in the possession of the prisoner. In *Thompson*'s case there seems to have been some confusion in the use of the expression “*about* the person.” The words of the act are “*from* the person,” and with submission to the majority of the Judges who held the asportation in that case not to be sufficient, I think the minority were right. The Judges in that case may have thought that the outer coat which covered the pocket formed a protection to the pocket-book; but we must not fritter away the law by refining upon nice distinctions in a way to prevent our decisions from being consistent with common sense.

ALDERSON B.—To constitute the offence there must be a removal of the property from the person; but a hair's breadth will do.

The other learned Judges concurred.

Conviction confirmed.

REGINA *v.* WILLIAM CORNISH.

1854.

THE following case was reserved for the opinion of the Court of Criminal Appeal, by the Chairman of the Quarter Sessions for the county of *Cornwall*.

The prisoner, *William Cornish*, was tried at the *Michaelmas* Sessions 1854, for the county of *Cornwall*, upon an indictment charging him, jointly with *Thomas Roscorla*, with stealing on the 6th day of *October* then instant, at *Saint Columb*, in the county of *Cornwall*, two tons of coal, the property of *William Ford Geake*, and others.

The prosecutor contracted with the prisoner *William Cornish*, who keeps carts and horses, and hires himself out as a common carrier, to carry a cargo of coals from a ship at *Porth*, in the said county, to a coal yard there, which the prosecutor rented for the purpose of lodging the coal, and from thence to carry the coals to a yard of the prosecutor's, in the town of *Saint Columb* aforesaid, a distance of about six miles. The prisoner, *William Cornish*, employed the said *Thomas Roscorla*, who also keeps a cart and horses, to assist him. The coals were unloaded by them and carted to the prosecutor's yard at *Porth* aforesaid. The prisoner, *William Cornish*, was engaged for several days carting the coals from thence to the prosecutor's yard at *Saint Columb*, and on the day mentioned in

the other yard he delivered the two cart loads to a third person on his own account; but he^duly delivered the wagon load at the prosecutor's other yard. Held, that the conviction was wrong, the coals having been delivered to the prisoner as a carrier, and there having been no breaking of bulk or other determination of the bailment.

1854. the indictment, he left the yard at *Porth*, with his son and the said *Thomas Roscorla*, driving two carts and one wagon laden with coals towards *Saint Columb*. When near the top of the town of *Saint Columb*, the prisoner, *William Cornish*, directed his son and the said *Thomas Roscorla* to take the two cart loads of coal to a Mr. *Davey* (who had not ordered them), where the prisoner, *William Cornish*, also went and delivered the coal, putting the value of the coal to an account he had with *Davey*. He the prisoner, *William Cornish*, delivered the waggon load of coals at the prosecutor's yard in *Saint Columb*. No communication was made by the prisoner that he had so done to Mr. *Geake*, the prosecutor.

CORNISH's Case.
It was objected by the Counsel for the prisoners, that under these circumstances no larceny was committed by them. I reserved the point. The jury found the prisoner, *William Cornish*, guilty. *Thomas Roscorla* was acquitted. Judgment on the prisoner, *William Cornish*, was postponed, and he was subsequently discharged on recognizance of bail to appear and receive judgment. I have to request the opinion of the Court of Criminal Appeal whether the conviction can be supported.

This case was considered on 2nd December 1854, by JERVIS C. J., POLLOCK C. B., PARKE B., MAULE J., WIGHTMAN J., ERLE J., PLATT B. and CROMPTON J.

No Counsel appeared either for the Crown, or for the prisoner.

JERVIS C. J.—The conviction cannot be supported. It is expressly stated in the case that the coals were delivered to the prisoner as a carrier. He was a bailee of the coals, and his dishonest delivery of the two cart loads to Mr. *Davey* does not make him guilty of larceny.

PARKE B.—It is quite clear there was no breaking
of bulk so as to determine the bailment.

1854.

The other learned Judges concurred.

CORNISH's
Case.

Conviction quashed.

REGINA v. WILLIAM FERGUSON.

1855.

THE following case was reserved for the opinion of the Court of Criminal Appeal by *R. B. Armstrong* Esq., Recorder of the city of *Manchester*.

William Ferguson, was tried before me at the sessions for the city of *Manchester*, in November 1854, on the following indictment, that is to say :

City of *Manchester* in the } The jurors for our lady county of *Lancaster* to wit. } the Queen upon their oath present that *William Ferguson* late of the city of *Manchester* in the county of *Lancaster* laborer on the twenty-sixth day of *October* in the eighteenth year of our sovereign lady *Victoria* by the grace of God of the United Kingdom of Great *Britain* and *Ireland* Queen defender of the faith with force and arms at the city aforesaid in the county aforesaid and within the jurisdiction of this Court in and upon one *William Edward Williams* in the peace of God and of our lady the Queen then and there being feloniously did make an assault with intent the money goods and chattels of the said *William Edward Williams* from counts. Held, that the objection was unfounded, and that the prisoner was properly convicted.

The prisoner was indicted in one count for feloniously assaulting the prosecutor with intent to steal the moneys and goods of the prosecutor; and in the second count for the misdemeanor of attempting to steal the same moneys and goods. The prisoner was found guilty on the first count, whereupon his Counsel moved in arrest of judgment, on the ground that the indictment was bad, by reason of a misjoinder of

1855. the person and against the will of him the said *William Edward Williams* then and there feloniously and violently to steal take and carry away against the form of the statute in such case made and provided and against the peace of our said lady the Queen her crown and dignity.

And the jurors aforesaid upon their oath aforesaid do further present that the said *William Ferguson* on the said sixteenth day of *October* in the eighteenth year of the reign aforesaid with force and arms at the city aforesaid in the county aforesaid and within the jurisdiction aforesaid unlawfully did attempt and endeavour feloniously then and there to steal take and carry away the moneys goods and chattels of the said *William Edward Williams* from the person and against the will of the said *William Edward Williams* against the peace of our lady the Queen her crown and dignity.

Tried: guilty of an assault with intent to steal: twelve calendar months' hard labour.

The jury found a verdict of guilty of an assault, with intent to rob, and thereupon the learned Counsel for the prisoner moved in arrest of judgment that the indictment was bad by reason of the misjoinder of counts, and that no judgment thereon could be sustained. I thought that the objection ought to have been taken earlier, but said that I should ask for the opinion of the Court of Criminal Appeal upon the point.

I sentenced the prisoner to twelve calendar months hard labour in the gaol of the city of *Manchester*; and the question for the opinion of this Court now is, whether, upon the indictment above set forth and the verdict of the jury so found thereon, such sentence was warranted?

This case was considered on the 20th of *January* 1855, by Lord CAMPBELL C. J., COLEHIDGE J., CRESSWELL J., PLATT B. and WILLIAMS J. FERGUSON'S Case.

No Counsel appeared either for the Crown or for the prisoner.

Lord CAMPBELL C. J.—There really is no difficulty in the world in this case ; and I must say that I regret that the learned Recorder, for whom I have a great respect, should have thought it necessary to reserve it. The question is, whether the indictment was bad on account of an alleged misjoinder of counts. The prisoner was convicted on the count for felony only, and it is the same thing as if he had been convicted upon an indictment containing that single count ; and it is allowed that there was abundant evidence to warrant that conviction. There is not the smallest pretence for the objection, that the indictment also contained a count for misdemeanor, and it does not admit of any argument.

The other learned Judges concurred.

Conviction affirmed (a).

(a) See *O'Connell v. Regina*, 9 Jur. Rep. 25.

REGINA v. EMANUEL TEW.

1855.

THE following case was reserved for the opinion of the Court of Criminal Appeal by the Chairman of the General Quarter Sessions of the Peace for the county of *Carmarthen*. The witness-
es against
a prisoner
charged with
larceny were,
previously to
their exami-
nation before
the grand
jury, sworn

At the *Epiphany* Quarter Sessions held for the in open Court by the crier of the Court. Held, that they were properly sworn.

1855.

Tew's Case.

county of *Carmarthen* in 1855, *Emanuel Tew* was tried for and convicted of larceny. The witnesses were, previous to their examination before the grand jury, sworn in open Court by the crier of the Court in the usual manner, but the clerk of the peace has no accurate recollection whether he heard or saw the oath being administered ; but he directed the attorney for the prosecution to take the witnesses to the crier to be sworn.

After the delivery of the verdict, the advocate for the prisoner moved in arrest of judgment, on the ground that in the Court of Quarter Sessions the oath should have been administered to the witnesses previous to their examination before the grand jury by the clerk of the peace himself, and not by the crier.

The advocate for the prisoner so urgently maintained the validity of his argument, that the Court has thought it advisable to request your Lordship's opinion on the following points :

Whether the administration of the oath to the witnesses by the crier of the Court of Quarter Sessions in open Court, previous to their examination before the grand jury, is a valid administration of the oath, so as to sustain the finding of that jury ? If not, whether the objection taken by the advocate for the prisoner was properly and in time taken after the delivery of the verdict ? And whether it is absolutely necessary in the Court of Quarter Sessions that the witnesses, previous to their examination by the grand jury, should be sworn by the clerk of the peace personally, in order that the oath should be of validity to sustain the finding of the grand jury ?

Judgment was passed on the said *Emanuel Tew*, and he was sentenced to three months' imprisonment with hard labour, but was admitted to bail.

This case was considered on the 20th of *January* 1855, by Lord CAMPBELL C. J., COLERIDGE J., CRESSWELL J., PLATT B. and WILLIAMS J.

1855.
Tew's
Case.

No Counsel appeared either for the Crown or for the prisoner.

Lord CAMPBELL C. J.—Since the constitution of this Court, this is the most frivolous case that has come before us. What is the objection? Why that the witnesses were sworn by the crier of the Court; and the conundrum is, that they ought to have been sworn by the clerk of the peace. If they had been so sworn, it would have been by an officer of the Court; and the crier is an officer of the Court, and the organ of the Court. When he administers the oath, the Court administer it. The objection is unfounded, frivolous and discreditable; and I hope such an objection will never again come before this Court.

The other learned Judges concurred.

Conviction affirmed.

REGINA v. CHARLES BURDETT (indicted with THOMAS LUCK and WILLIAM COX).

1855.

THE following case was reserved for the opinion of *A. B. and C.* *A. B. and C.* were indicted for larceny, and were separately

defended. At the close of the case for the prosecution the Court decided that there was no case to go to the jury against *C.*, and he was acquitted. *C.* was then called as a witness in defence of *A.*, and gave evidence tending to criminate *B.* On this *B.*'s Counsel claimed the right to cross-examine *C.*, and address the jury in reply. This the Court refused to allow, but offered to put to *C.*, through the chairman, such questions as *B.*'s Counsel might suggest. *A.* and *B.* were both convicted. Held, that *B.*'s Counsel had a right to cross-examine *C.* and to reply on his evidence, and that the conviction of *B.* must be reversed.

Quaer, whether he would have had that right if the evidence of *C.* had not tended to criminate *B.*

Sembles, that this Court will in its discretion assign Counsel for a prisoner.

1855

BURDETT'S
Case.

puty Chairman of the Quarter Sessions of the Peace for the county of *Northampton*.

At the General Quarter Sessions of the Peace for the county of *Northampton*, held on the 29th of *June* 1854, *Thomas Luck*, *Charles Burdett* and *William Cox* were indicted and tried before me for stealing wood at *Overstone*, the property of *Lewis Loyd Esq.*

They were severally defended by separate Counsel. At the close of the case for the prosecution, the Court decided that there was no case to go to the jury against *Cox*, and he was acquitted. In the course of the defence for *Luck*, *Cox* was called and examined as a witness on his behalf, with a view of shewing that *Luck* was an innocent agent in taking the wood, and in so doing *Cox* gave evidence tending to criminate *Burdett*. *Burdett's* Counsel claimed the right of cross-examining *Cox*, and then addressing the jury upon his evidence. This was opposed by *Luck's* Counsel, and the Court refused permission to cross-examine and address the jury, but offered to put through the Chairman, such questions as *Burdett's* Counsel suggested. *Luck* and *Burdett* were both convicted. Being doubtful whether the Court was right in its decision, I consented to reserve the case of *Burdett* for the consideration of the Justices of either Bench and Barons of the Exchequer, and I have to request their opinion thereon. The question is whether the Court was right in refusing *Burdett's* Counsel the right to cross-examine and address the jury on *Cox's* evidence for the defence ?

The Court respited judgment and discharged *Burdett* upon his entering into recognizance with sureties to appear and receive judgment at the next *Epiphany* General Quarter Sessions of the Peace.

This case came on to be argued on the 11th of

November 1854, before JERVIS C. J., ALDERSON B., COLERIDGE J., MARTIN B. and CROWDER J.

1855.

BURDETT'S
Case.

Markham appeared for the Crown ; no Counsel appeared for the prisoner.

Markham, for the Crown. Nothing occurred at the trial to vitiate the proceedings. The cross-examination did take or could have taken place.

JERVIS C. J.—The Chairman says that he refused to allow the prisoner to cross-examine.

ALDERSON B.—This is a case in which Counsel ought to appear for the prisoner.

JERVIS C. J.—It may seem fit to the Court to assign Counsel.

Markham stated that he had thought *W. H. Roberts* who defended the prisoner on the trial would have been instructed.

The further hearing of the case was then adjourned and came on again for argument on the 3rd *February 1855*, before **JERVIS C. J., PARKE B., MAULE J., CRESSWELL J., WIGHTMAN J., ERLE J., PLATT B., WILLIAMS J. and CROMPTON J.**

Markham appeared for the Crown, and *W. H. Roberts* for the prisoner.

W. H. Roberts for the prisoner. At common law a person accused has a clear right of cross-examination. The capacity of a witness to be examined draws along with it the right of the accused to cross-examine him ; and at common law and by statute the Counsel for *Burdett* had the right to cross-examine his witness and reply upon his evidence.

There is a case of *Regina v. Woods and May* (a), in which two prisoners were indicted for manslaughter, and the Counsel for one of them having addressed the jury on his behalf, the Counsel for the second prisoner

1855. did the same, and called witnesses whose evidence tended to shew negligence on the part of the first, and it was held by Mr. Commissioner *Gurney*, after consulting Mr. Justice *CRESSWELL* and Mr. Justice *WILLIAMS*, that the Counsel for the first prisoner had a right to cross-examine the witnesses for the second, and then to address the jury again, confining himself to comments on the testimony the second prisoner had adduced.

BURDETT'S Case.
The only other case bearing on the point which I have been able to find is *Beale v. Moule* (*a*), in which the same principle is laid down.

The Court then called upon

Markham, for the Crown. The irregularity, if any, was not of sufficient importance to vitiate the proceedings. The privilege contended for is not so much a matter of right as a matter of discretion, and the Court will look to see whether substantial justice has been done. The object and effect of cross-examination is to search, examine, sift, and obtain admissions from the witness; here the prisoner had an opportunity of putting questions through the mouth of the Chairman, and it is for the prisoner to shew that any injustice has been done by the direction of the Court that the examination should be conducted in that way.

MAULE J.—There are two men called *Luck* and *Burdett* on their trial—there is a third man named *Cox*, no matter whether he had been accused of the same charge or not. *Luck* in his defence calls this man named *Cox* as a witness, and asks him some questions. If *Luck* had a right to examine *Cox*, *Burdett* had a right also. Then *Burdett*, not having elected to call *Cox*, claims a right to examine him

when put into the witness box, and I think he had quite as good a right to question *Cox* as *Luck* had.

1855.

BURDETT'S
Case.

Markham. The mode of conducting an examination, whether on a criminal or civil inquiry, is entirely in the discretion of the Court, and this Court will not set aside the conviction unless they can see that manifest injustice has been done.

MAULE J.—If a man has a right to put a question, he has a right to put it himself.

Markham. All that the case of *Regina v. Woods and May* (a) shews is, that it is discretionary with the Court whether such a right should be allowed. All that Mr. Commissioner *Gurney* decided in that case was, that the cross-examination was reasonable, and should be allowed; not that it was a right, and must be allowed.

WIGHTMAN J.—If it was reasonable and should be allowed, it was a right, and ought to be allowed.

Markham. I contend that it is discretionary, and the case of *Beale v. Moule* (b), also cited on the other side, decides nothing more than that.

There is a case of *Rex v. Kroehl, Gibson and Koech* (c). There the three defendants were tried for a conspiracy, and were defended separately, *Koech* alone called witnesses, and examined to a conversation between himself and *Kroehl*. The Counsel for the prosecution was proceeding to cross-examine as to another conversation between *Koech* and *Kroehl*, when the Counsel for the prisoner *Kroehl* objected, on the ground that the effect might be to bring out a new case against *Kroehl*, although he had called no witnesses, and after the case for the Crown was finished; but *Abbott* J. said, that as *Koech* had called witnesses he could not prevent the cross-exa-

(a) 6 Cox C. C. 224. (b) 1 Car. & Kir. 1.

(c) 2 Stark. N. P. 343.

1855. mination as to any conversations that might affect *Koech*, although it might be matter for future consideration whether the Counsel for *Kroehl*, after such evidence, would have a right to address the jury upon it. The question of cross-examination by the Counsel for the other prisoner did not arise, but *Abbott J.* clearly dealt with the questions of cross-examination and reply as matters in the discretion of the Court.

W. H. Roberts was not called upon to reply.

Jervis C. J.—In this particular case we think that the prisoner *Burdett* had a right to cross-examine the witness, and to cross-examine him without doing so through the Court, and had also a right to reply on his evidence. We must not, however, be understood as saying that he would have had that right if the evidence of the witness had not tended to criminate him. All we decide is, that in this particular case the course taken was wrong, and that the conviction must be reversed.

Conviction reversed.

*11 March 1855. 1C / March 217
Ld 1C Res 284: 113rd Col 5565-571
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1855.

REGINA v. THOMAS DOLAN.

The prisoner was convicted of feloniously receiving stolen goods under the following circumstances.

The goods were found by the owner in the pockets of the thief. The owner sent for a policeman who took the goods, but subsequently returned them to the thief, who was sent by the owner to sell them where he had sold others. The thief then went to the shop of the prisoner and sold the goods, and gave the money to the owner. Held, that the conviction was wrong.

Semble, that the Court of Criminal Appeal having no taxing officer, the costs of proceedings in that Court must be taxed in the Court below.

THE following case was reserved for the opinion of the Court of Criminal Appeal by *M. D. Hill Esq.*, Recorder of the borough of *Birmingham*.

At the Sessions held in *Birmingham* on the 5th

of January 1855, *William Rogers* was indicted for stealing, and *Thomas Dolan* for receiving certain brass castings, the goods of *John Turner*. *Rogers* pleaded guilty, and *Dolan* was found guilty.

1855.
DOLAN'S
Case.

It was proved that the goods were found in the pockets of the prisoner *Rogers* by *Turner*, who then sent for a policeman, who took the goods and wrapped them up in a handkerchief, *Turner*, the prisoner *Rogers*, and the policeman, going towards *Dolan's* shop. When they came near it, the policeman gave the prisoner, *Rogers*, the goods, and the latter was then sent by *Turner* to sell them where he had sold others, and *Rogers* then went into *Dolan's* shop and sold them, and gave the money to *John Turner* as the proceeds of the sale. Upon these facts it was contended on the part of *Dolan*, that *Turner* had resumed the possession of the goods, and that *Rogers* sold them to *Dolan* as the agent of *Turner*, and that consequently, at the time they were received by *Dolan*, they were not stolen goods within the meaning of the statute.

I told the jury upon the authority of the case of *The Queen v. Lyon and Another*, Carr. & Marsh, 217, cited by the Counsel for the prosecution, that the prisoner was liable to be convicted of receiving, and the jury found him guilty. Upon this finding, I request the opinion of the Court of Appeal in Criminal Cases, on the validity of *Dolan's* conviction.

Dolan has been sent back to prison, and I respite judgment on the conviction against him, until the judgment of the Court above shall have been given.

This case was argued on the 20th of January 1855, before Lord CAMPBELL C. J., COLERIDGE J., CRESSWELL J., PLATT B. and WILLIAMS J.

Beasley appeared for the Crown, and *O'Brien* for the prisoner.

1855.

DOLAN's Case.

O'Brien, for the prisoner. When the goods reached *Dolan's* hands, they were not stolen goods within the meaning of the statute.

Lord CAMPBELL C. J.—Unless the case of *The Queen v. Lyons* (a) is in your way, you seem to have a very strong case to support. It was only upon the authority of that case that the learned Recorder acted.

O'Brien. There were no indelible marks left of the fact that the goods had been stolen. I think this case may be distinguished from *Reg. v. Lyons*; but if not, the decision in that case was not very satisfactory, and it would be difficult to support it. In that case a boy had stolen a brass weight from his master, and after it had been taken from him in his master's presence it was restored to him again, with his master's consent, in order that he might sell it to a man to whom he had been in the habit of selling similar articles which he had stolen before. The boy did sell it to the man, and the man being indicted for receiving it, was convicted; and COLERIDGE J., before whom the prisoner was tried, is reported to have said, that “for the purposes of the day he should consider the evidence as sufficient in point of law to sustain the indictment.”

COLERIDGE J.—I do not think so for the purposes of this day.

Lord CAMPBELL C. J.—We all think that for the present, at all events, we may hear the other side.

Beasley. In *Reg. v. Lyons*, COLERIDGE J. seems to have fully considered the objection; for although the matter was subsequently called to his Lordship's attention by the prisoner's Counsel, yet no alteration was made in the judgment of the Court, “from which,” says the Reporter, “it is to be inferred that

upon consideration, his Lordship did not think that in point of law the objection ought to prevail."

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Case.

There is however a distinction between the facts of that case and the present; there the property was stolen by a lad in the prosecutor's employ, and had been received from him by another servant, and restored to him again. Being taken by another servant, it was constructively in the possession of the master. Here there was no intention on the part of the prosecutor to restore these goods to himself, and the policeman, by taking the goods, did not restore the possession or property to the owner. If the owner had been absent, it no doubt would have been so, and his presence made no difference. The owner did nothing to obtain possession of the goods.

Lord CAMPBELL C. J.—The custody of the policeman at the time was the custody of the master.

Beasley. The policeman allows the owner to stand by, and whatever he did he may be considered as doing as the agent of the policeman.

Lord CAMPBELL C. J.—It must be the same, whatever the result may be, as if the owner of the goods had taken them into his own hand and given them to the policeman. There was a bailment by *Turner* to the policeman, and the policeman had become the bailee for the owner of the goods.

Beasley. It is not necessary, under the statute, that the goods should be actually taken from the possession of the thief.

Lord CAMPBELL C. J.—Do you mean to say that at any past period of time, they having been stolen and the master having recovered and long enjoyed the possession of them, that the receipt of the goods with a knowledge they had been stolen would be an offence within the act of Parliament?

CRESSWELL J.—What I understand you to say is,

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Case.

that the policeman, taking them from the thief, never in fact restored the possession or the property to the owner ; that if the master had been absent, the taking by the policeman clearly would not have had that effect, and the policeman would have taken them as an officer of the law ; and that the master's presence made no difference.

Beasley. That is the view I take. If the policeman had refused to deliver up the goods, he could not have been compelled by the master to do so. In fact, the master was rather the agent of the policeman than the policeman the agent of the master. The policeman had the entire control over the goods.

PLATT B.—The act from which you start was really the intervention of the master.

Lord CAMPBELL C. J.—If he was sent by the master, it was precisely the same as if the master had possession and had restored the goods to the policeman for that particular purpose.

Beasley. Suppose the master had said nothing, but all were acting jointly, and that when they got to the shop the policeman had given the goods to the boy by the master's direction, the master standing by and not interfering ? *Beasley* then referred to cases where larcenies were committed in consequence of the contrivance of the owner of the goods, as where money was marked and placed in the way of the thief for the purpose of being stolen by him, and also to convictions for coining, in cases where the coining has actually been permitted to go on by the authority of the Mint.

Lord CAMPBELL C. J.—In this case I must say I feel very strongly that the conviction is wrong. I do not see how it can be supported, unless the doctrine were laid down, that if at any period of the history of a chattel which has been stolen and has been

restored to the owner, who has long had it in his possession, the same chattel should be received from the owner by a person who knew that it had been once stolen, such a receiving would be an offence within the statute. I think that such a receiving could never be said to be an offence within the meaning of the statute, any more than it could make the receiver an accessory at common law to the felony. If an article once stolen has been restored to the master of that article, and he having had it fully in his possession, bails it for any particular purpose, how can any person who receives the article from the bailee be said to be guilty of receiving stolen goods within the meaning of the act of Parliament? What is stated in this case? We find that it was proved that the goods were found in the pockets of the prisoner *Rogers* by *Turner* the prosecutor, who then sent for a policeman, and he took the goods and wrapped them up in a handkerchief; *Turner*, the prisoner *Rogers*, and the policeman, going towards *Dolan's* shop; when they came near it, the policeman gave the prisoner *Rogers* the goods, and the latter was sent by *Turner* to sell them where he had sold others, and *Rogers* then went into *Dolan's* shop and sold them, and gave the money to *Turner* as the proceeds of the sale. Now, *Turner*, the owner, had possession of the goods just as much as if he had taken them into his own hands and had delivered them from his own possession to another person for a particular purpose. He was the bailor of the goods subsequently to the theft, and the other person was the bailee. After that the goods are carried by *Rogers* by the direction of the master of the goods to the prisoner, who receives them. That is not a receiving of stolen goods within the meaning of the act of Parliament. With regard to the case relied upon

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Dolan's Case.

1855. I really must think that the facts of that case are not quite accurately stated, and that there was something in the case which does not appear in the report ; but if not, I am bound to say, and I do so with the most sincere and profound respect for my learned Brother, that I cannot agree with the decision, and I do not think that we ought to act upon it.

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COLERIDGE J.—I have no recollection now of the case of *R. v. Lyons*, cited from Carr. & Marsh, and therefore I have no right to say it is imperfectly reported. Assuming, however, that it is rightly reported, I must say I consider I was wrong. It appears to me in the present case, that one mode of testing it would be by seeing how the case would stand, putting the policeman out of the question. Now if the policeman were put out of the question, it is clear the goods were in the possession of the owner. The goods which had been stolen had passed into the possession and were under the control of the real owner. They are then placed in the possession of *Rogers* for a specific purpose, and they were then no longer in the possession of *Rogers* in the character of stolen goods, so as to make the subsequent receipt of them by *Dolan*, a receiving of stolen goods within the statute.

Now let us see whether the policeman's interference affects the case. In the first place the goods are found by and are in the possession of the master, who sends for the policeman, who takes them into his possession by the authority of the master. The policeman detained them in his possession for the purposes of the law ; but it is evident, from the facts of the case, that the master retained his control over them, for he again interposes, and what is done afterwards is done by his authority. I think it ought to be taken that they remained under the control of the

owner, and if I am right in that conclusion, the interference of the policeman is immaterial, and the conviction was wrong.

CRESSWELL J.—I do not dissent from the other members of the Court in holding that the conviction was wrong, but we are called upon to give our reasons, and I am sorry I cannot concur with my Lord and my learned Brother, in some of the reasons which they have given. If it were necessary to hold that the policeman by taking possession of the stolen goods from the pocket of the thief, restored the possession of the master, I should dissent from the decision. I think we cannot put the policeman out of the question. The goods were in the custody of the law for the purposes of the administration of the criminal justice of the land, and the master could not have demanded them of the policeman. But on the other part of the case, I think that when the goods were given back by the policeman to *Rogers*, and the master desired *Rogers* to go and sell them, it may be considered that the master employed *Rogers* as his agent for that purpose, and that *Dolan* did not receive them as stolen goods within the meaning of the statute. I think the other view may some day or other lead to considerable difficulty.

PLATT B.—*Turner* took these goods out of the pocket of *Rogers*.

CRESSWELL J.—No, the policeman took them.

PLATT B.—It is said that the goods were found in the pockets of *Rogers* by *Turner*, who then sent for a policeman, who took them out.

COLERIDGE J.—It is not said he took them out of the pocket of *Rogers*; he might have taken them from *Turner*.

PLATT B.—I do not think that makes any difference; at all events by the agency of the policeman

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1855. they are removed. The policeman received them, and with a view of catching the receiver, he puts them back into the custody of *Rogers*; that placed all the parties *statu quo* in which they were when the goods were first found in the pockets of *Rogers*. Then the owner of the goods says to the thief: "Go and sell them to *Dolan*." Would not that be a valid sale? The owner of goods sends an agent to *Dolan* to sell them. If a bargain made on such an authority would not be a binding bargain, I do not know what would? Can any thing criminal arise out of it? The act of Parliament was never meant to apply to a case of this sort. It is precisely the same as if *Turner* had had them in his pocket, and had then sent them to *Dolan*. If a receiving by *Dolan* after that would be a receiving within the statute, this would be a receiving; but I am of opinion that it is not.

WILLIAMS J.—I am of opinion that this conviction was wrong. I think why it is wrong is this; in order to make out a felonious receipt, it must be a receipt without the authority of the owner of the goods. Looking at the framing of the indictment, every part of it may be said to be proved; but the question is, whether *Dolan* received the goods within the meaning of the statute. I think it is impossible to say that he did, inasmuch as he received them from the person who had been employed by the owner to sell them.

Conviction quashed.

Beasley, applied to the Court as to costs, stating that the difficulty was as to the mode of ascertaining what costs should be allowed to the prosecutor, and whether such costs should be taxed by the officer of this Court, or by the officer of the Court below. The costs would, no doubt, be costs of the prosecution;

but the statute constituting this Court was silent as to how the amount of such costs was to be ascertained.

Lord CAMPBELL C. J.—This Court has no jurisdiction. The Court has no taxing officer, and I do not see how we can interfere (*a*).

(*a*) In *Reg. v. Cluderoy* (3 Car. & Kir. 205), WILLIAMS J. held that he had power under 7 Geo. 4, c. 64,

s. 22, to allow the costs of the prosecution in arguing a case reserved for the opinion of this Court.

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Case.REGINA *v.* JOHN GIBBS.

1855.

THE following case was reserved for the opinion of the Court of Criminal Appeal by Mr. Justice COLERIDGE.

The prisoner was tried before me at the Summer Assizes, 1854, for the county of *Somerset*, and convicted on an indictment for embezzlement. The first count charged him, as servant to *Jane Dickinson*, with embezzling 2*s.* 1½*d.* On the second no evidence was offered. On the third he was charged, as servant to *Eliza Gould*, with embezzling 3*s.*

The prisoner was convicted on an indictment charging him with embezzlement in one count as servant to *A.*, and in another count as servant to *B.* *A.* and *B.* were two among other sewers of gloves residing

at *C.*, the manufacturers of the gloves carrying on business at *D.* The prisoner was a carrier residing at *C.*, and was exclusively employed between the glove sewers at *C.* and the manufacturers at *D.* The sewers were not known to the manufacturers, but when a sewer wanted work the prisoner gave her name and a number to the manufacturers, and received from them unsewn gloves for her to sew. Each sewer, having her number, sent back by the prisoner the gloves when sewn with her name pinned to the parcel. These parcels the prisoner delivered to the manufacturers, and if the parcels were found correct he received the total amount due to the sewers in one sum, and fresh parcels of unsewn gloves. His duty then was to deliver to each sewer her fresh work and also the money due to her, deducting his charge. If any work was missing the manufacturers looked to the sewer if found, but if not they looked to the prisoner for it. The prisoner, according to the course above stated, took out numbers for *A.* and *B.*, and having received money for both of them from the manufacturers, denied the receipt of the money, and applied it to his own use. Held, that the prisoner was not a servant but merely a bailee, and was only guilty of a breach of trust and not of embezzlement.

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Jane Dickinson and *Eliza Gould* were two, among many others, makers-up and sewers of gloves, residing at *Somerton*. Messrs. *Southcomb and Chard* were glove manufacturers at *Stoke-under-Hamden*. The prisoner was a carrier, residing at *Somerton*, and going from that place to *Stoke* and back; employed, however, only, between the glove sewers and manufacturers, in carrying the gloves from and to the one and the other. The manufacturers at *Stoke* know nothing of the individuals at *Somerton* who sew and make up their gloves for them; but the prisoner gives the name of, and takes out a number for, any woman who desires to be employed, and receives a certain number of unsewed gloves from the manufactory. The sewers at *Somerton*, each having her number, send back their gloves, when sewed, in separate parcels, each with their name pinned to the parcel, by the prisoner to the factory. He delivers the parcels, and, if these are found correct, the total amount due is paid to him in one sum, and fresh parcels of unsewn gloves are delivered to him. His duty then is to deliver to each workwoman her money, deducting his charge, and her fresh work. The manufacturers, though they know nothing personally of the women to whom the gloves are sent, except by the numbers given, assuming their existence, look to them for the work; but if any work be missing and the woman not found, they look to the carrier for it.

According to the course here stated, the prisoner had taken out numbers for *Jane Dickinson* and *Eliza Gould*. On June 7th each of them had given him a parcel of sewed gloves to be taken to the manufacturers, which he duly delivered. *Jane Dickinson's* work entitled her to receive 2s. 1½d.; *Eliza Gould's* entitled her to receive 3s.; and these sums, with several others, in one sum, were paid to the prisoner in respect of

such work. On his return they applied to him for their money and fresh work ; he denied the receipt of any money for them, and fraudulently applied these sums to his own use.

These facts being clearly proved, a verdict passed for the Crown, and I sentenced the prisoner ; but I request the opinion of the Judges whether he was properly convicted of the crime of embezzlement ?

This case was considered on the 11th of *November* 1854, by JERVIS C. J., ALDERSON B., COLERIDGE J., MARTIN B. and CROWDER J.

No Counsel appeared either for the Crown or for the prisoner.

Cur. adv. vult.

On the 20th of *January* 1855, the following judgment was delivered by

COLERIDGE J. (a) The question is whether upon the facts stated in this case, the prisoner can be held to have been a servant to the prosecutrices *Jane Dickenson* and *Eliza Gould*, or either of them. According to the common acceptation of the term, it is impossible that the prisoner can be considered as their servant. The ordinary relation of master and servant cannot be said to have subsisted between them ; the women would not have been responsible for the negligence of the prisoner ; and, unless there were decided cases precisely in point, we could not come to the conclusion that he was a servant to them within the meaning of the statutes against embezzlement. Though some of the decisions go very far in making persons liable as servants to punishment for embezzle-

(a) The other Judges present were Lord CAMPBELL C. J., CRESSWELL J., PLATT B., and WILLIAMS J.

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ment, none go so far as this. The prisoner was in fact a common carrier for all persons who chose to employ him within a limited district; and he was like all carriers at common law only bound to carry such a description of goods, and between such places as he professed to carry. The case of *Lane v. Cottan* (*a*), is an authority on this point, and that case was cited in *Johnson v. The Midland Railway Company* (*b*), where it was held that a railway company carrying goods was not subject to a greater liability than a carrier at common law, and was not bound to carry every description of goods, and between all places on the line of railway, but only such description of goods and between such places as the company publicly professed to carry.

We consider, therefore, that the prisoner in this case was a mere bailee, and that the non-delivery of the money which he had received was merely a breach of trust, and not an embezzlement. The decision in *Regina v. Hey* (*c*) is applicable to this case. In that case the prisoner was employed by the prosecutors as a drover, but he was at liberty to drive the cattle of any other persons, and it was held that he was merely a bailee, and not a servant.

Conviction quashed.

(*a*) 12 Mod. 484. (*b*) 4 Exch. 372. (*c*) 1 Den. C. C. 602.

REGINA v. THOMAS ARCHER.

1855.

THE following case was reserved for the opinion of the Court of Criminal Appeal, by *T. F. Ellis Esq.*, the Recorder of *Leeds*.

The defendant was indicted for a misdemeanor at the *Leeds* Borough Sessions, holden before the Recorder of that borough, on 3rd *March* 1855. The indictment contained four counts. The first count in substance charged the defendant with obtaining from *Samuel Hirst*, on the 6th day of *January* last (by falsely pretending to *Samuel Hirst* that there was then one *John Smith*, who was an ironmonger, and who lived at *Newcastle*, and that the said *John Smith* was a person to whom the said *Thomas Archer* durst trust one thousand pounds, and that the said *John Smith* went out twice a year to *New Orleans*, to take different kinds of goods to his the said *John Smith's* sons, and that the defendant then wanted some cotton warp cloths for the said *John Smith* of *Newcastle*), one end of cotton warp cloth, goods of the said *Samuel Hirst*, with intent to defraud, whereas in truth and in fact there was not then one *John Smith*, who was an ironmonger, and who lived at *Newcastle*, and whereas in truth and in fact the said *Thomas Archer* did not then want the said cotton warp cloth or any cloths whatever for the said *John Smith*, as he the said *Thomas Archer* well knew at the time when he did so falsely pretend as aforesaid. The second count in substance charged the defendant with obtaining from the said *Samuel Hirst* on the 11th *January* last (by

The defendant was indicted for obtaining goods by false pretences. It appeared that he obtained the goods from the prosecutors by pretending that he wanted them for one *J. S.*, whom he represented as living at *N.*, and being a person to whom he would trust 1000*l.*, and who went out twice a year to *New Orleans* to take goods to his sons. The jury found that all the representations were false, and that the prosecutors, believing that the defendant was connected with the said *J. S.*, and employed by him to obtain the goods, contracted with the defendant and not with the

supposed *J. S.*, and delivered the goods to the defendant for himself and not for *J. S. Held*, that the defendant was, under these circumstances, rightly convicted of the offence charged in the indictment.

1855. falsely pretending to the said *Samuel Hirst* that he
the defendant then wanted for the said *John Smith*,
who was an ironmonger, and who lived at *Newcastle*,
four other ends of cotton warp cloths) four ends of
cotton warp cloths, goods of the said *Samuel Hirst*,
with intent to defraud, whereas in truth and in fact
the said *Thomas Archer* did not then want for the
said *John Smith* the said last mentioned four ends of
cotton warp cloths, or any cloths whatever, as he the
said *Thomas Archer* well knew at the time when he
did so falsely pretend as last aforesaid. The third
count stated that long before and at the time of com-
mitting the offence in that count mentioned, *John Holt*, a commission agent for the sale of woollen
cloths, was well known to the said *Samuel Hirst*, and
did business with the said *Samuel Hirst* as a commis-
sion agent for the said *Samuel Hirst*, and that the
defendant afterwards, to wit, on the 11th day of
January last, obtained from *Benjamin Holt*, being
servant to *John Holt* (by falsely pretending to the
said *Samuel Hirst* that he, the defendant, then wanted
for the said *John Smith*, of *Newcastle*, who was a
person worth some thousands of pounds, two ends of
black cloth), two ends of black cloth, goods of the
said *John Holt*, with intent to defraud, whereas in
truth and in fact the said *Thomas Archer* did not
then want for the said *John Smith* the said two ends
of black cloth, or any cloth whatever, as he the said
Thomas Archer well knew at the time when he did
so falsely pretend as last aforesaid. The fourth count
in substance charged the defendant with obtaining
from the said *John Holt*, on 11th *January* last (by
falsely pretending to the said *Samuel Hirst* that he,
the defendant, then wanted for the said *John Smith*,
of *Newcastle*, two ends of black cloth), two ends of
black cloth, goods of the said *John Holt*, with intent

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to defraud, whereas in truth and in fact the said *Thomas Archer* did not then want for the said *John Smith*, of *Newcastle*, the said last mentioned two ends of black cloth, or any cloth whatever, as he the said *Thomas Archer* well knew at the time when he did so falsely pretend as last aforesaid.

The defendant pleaded not guilty to all the counts, and issue was joined on the part of the Crown.

On the trial before the said Recorder, evidence was given sufficient to warrant the conviction of the defendant on every one of the four counts, unless the following objection, taken by the Counsel for the defendant, be valid. The said Counsel contended that the evidence shewed that *Samuel Hirst* and *John Holt*, the two persons named in the indictment as owners of the goods obtained by the defendant, contracted to sell the goods to the defendant, not to the supposed *John Smith*, and delivered, and caused to be delivered to the defendant, in pursuance of such contract, the goods for the defendant himself, and not for the supposed *John Smith*; and the said Counsel contended, that this being so, the defendant was entitled to an acquittal, although it should appear that such contract, and such delivery in pursuance of such contract, resulted from the falsehoods told by the defendant as charged in the indictment, and from the belief given to such falsehoods by *Samuel Hirst* and *John Holt*.

The jury, in answer to questions put to them by the Recorder, stated that they were of opinion that the representations were made by the defendant as charged in the indictment, and that *Samuel Hirst* and *John Holt* believed such representations, and that such representations were false to the knowledge of the defendant, and that *Samuel Hirst* and *John Holt*, in consequence of such belief, thinking that the defendant

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Case.

1855. was a person with whom they might safely contract
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Case. as being connected with the supposed *John Smith*,
and employed by him to obtain the goods, did mean
to contract with the defendant, and not with the sup-
posed *John Smith*, and did, in pursuance of such
contract, deliver, and cause to be delivered, the goods
to the defendant, for the defendant himself, and not
for the supposed *John Smith*.

The Recorder directed the jury, that upon this view
of the facts they ought to find a verdict of guilty,
which they found accordingly.

The defendant was sentenced to be imprisoned and
kept to hard labour for nine calendar months, but
execution of the judgment was respite, and the
defendant not being able to give bail, was committed
to prison until the question hereafter mentioned should
have been considered. He is still in prison.

The question for the opinion of the Justices of either
Bench and Barons of the Exchequer is, whether the
defendant ought to have been convicted under the
circumstances above mentioned ?

This case was argued on the 28th of April 1855,
before POLLOCK C. B., PARKE B., WIGHTMAN J.,
CROMPTON J. and CROWDER J.

No Counsel appeared for the prisoner.

Pickering, for the Crown. There was a false
representation of an existing fact, namely, that the
defendant was connected with the supposed Mr. *Smith*,
and the jury have found that he obtained the goods
by means of that false representation, and that the
prosecutors, believing that representation intended to
contract with the defendant himself and not with
Smith. It was contended on the trial by the learned
Counsel for the defendant, that he was entitled to an
acquittal, inasmuch as the credit was given to him

and not to the person by whom he pretended to be employed; but that is not so, as it was upon the defendant's false representation of his connection with the supposed Mr. *Smith*, that the credit was obtained.

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Case.

POLLOCK C. B.—This conviction was right. If a man says "I want goods for a certain house and I mean to send them to that house, sell them to me," that would not be a representation of an existing fact; but here there was a false representation, that the defendant was connected with a person of opulence, and we all think that that is enough to sustain the conviction, it being a misrepresentation of an existing fact, upon the faith of which the property was obtained.

The other learned Judges concurred.

Conviction confirmed.

9 Cris Cr Cas 125 x 83 M 464

REGINA v. ELIZABETH CHANDLER. 1855.

16 6 Cris Cr Cas 579

THE following case was reserved for the opinion of the Court of Criminal Appeal, by Mr. Bramwell Q. C.

At the Assizes and General Session of Gaol Delivery holden at Maidstone on the 13th day of March 1855, *Elizabeth Chandler* was tried and found guilty before me on the first count of an indictment in the following form.

Kent.] The jurors for our lady the Queen upon their oath present that during all the time hereinafter

A single woman, the mother of an infant child, was indicted for neglecting to provide it with sufficient food, the indictment alleging that she was able and had the means so to do. There was no evi-

dence of the actual possession of means by the prisoner; but it was proved that she could have applied to the relieving officer of the union, and that if she had so applied, she would have been entitled to, and would have received relief adequate to the due support and maintenance of herself and the child. Held, that the allegation in the indictment was not supported by this evidence.

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Case.

in this indictment mentioned one *Elizabeth Chandler* was a single woman and was the mother of a certain male child known by the name of *Albert* of very tender age and wholly unable by reason of his tender age to provide himself with food or nourishment or to take care of himself and that during all the time aforesaid it was the duty of the said *Elizabeth Chandler* to protect shelter and nourish the said child and to provide for and give and administer to the said child suitable food in proper and sufficient quantities for the nourishment and support of his body and the preservation of his health she the said *Elizabeth Chandler* during all the time aforesaid being able and having the means to perform and fulfil her said duty And the jurors aforesaid upon their oath aforesaid further present that the said *Elizabeth Chandler* late of the parish of *Speldhurst* in the county of *Kent* well knowing the premises and not regarding her duty in that behalf but being a person of unfeeling and inhuman disposition on the first day of *October* in the year of our Lord one thousand eight hundred and fifty-four and continually from thence until the twenty-second day of *January* in the year of our Lord one thousand eight hundred and fifty-five at the parish aforesaid in the county aforesaid did unlawfully wilfully and on purpose give to the said child food and nourishment in quantities wholly inadequate and insufficient for the support and preservation of the body and health of the said child and did unlawfully wilfully omit neglect and refuse to provide for and to give to the said child meat drink or food in any sufficient or proper quantity whatsoever whereby by reason of the premises last aforesaid the life of the said child was endangered and the said child became and was sick ill weak starved and greatly emaciated in his body to the great damage of the said child and

against the peace of our said lady the Queen her crown and dignity.

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Case.

The first count was duly proved except as to the allegation : " She the said *Elizabeth Chandler* during all the time aforesaid being able and having the means to perform and fulfil the said duty." As to that allegation the evidence was, that the child was a bastard child of the prisoner, and that she was cohabiting with a man to whom she was not married, and who was not the father of the child. There was no evidence of her actual possession of means for nourishing and maintaining the child as stated in the first count of the indictment, but it was proved that she could have applied to the relieving officer of the poor law union in which she resided ; that, had she done so, she would have been entitled to and received relief for herself and the child adequate to their due support and maintenance, and that she had not made any such application ; and it was contended, by the Counsel for the prosecution, that this evidence satisfied the allegation above referred to. Entertaining doubts on this subject, and the validity of the first count in point of law being questioned, I have to request the judgment of the Court for the consideration of Crown Cases Reserved on these two points. Judgment on the said indictment stands respited, and the defendant was admitted to bail to receive judgment at the assizes next to be holden for the said county.

This case was considered on the 28th of April 1855, by POLLOCK C. B., PARKE B., WRIGHTMAN J., CROMPTON J. and CROWDER J.

No Counsel appeared either for the Crown, or for the prisoner.

POLLOCK C. B.—The indictment alleges that the

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prisoner being able and having the means neglected to maintain her child. We are all of opinion that there was no evidence that she had the means of maintaining it, and therefore that allegation in the indictment is not made out. It is not sufficient to prove that the prisoner might by possibility have obtained the necessary means. That may be so, but it does not fit the indictment, which says that she had the means. We are all of opinion that the conviction cannot be sustained.

PARKE B.—It does not appear by the evidence that the prisoner had the means, and whether she could have obtained the means must be matter of uncertainty. We therefore need not trouble ourselves about the validity of the indictment.

The other learned Judges concurred.

Conviction quashed.

5 Park 28 2 Park 585 57 Barb 33

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REGINA v. EMMA FORSTER.

On an indictment for uttering counterfeit coin, in order to prove a guilty knowledge, evidence may be given of a subsequent uttering by the prisoner of counterfeit coin of a different denomination to that men-

THE following case was reserved for the opinion of the Court of Criminal Appeal by Mr. Baron PARKE.

The prisoner was indicted at the Liverpool Spring Assizes 1855, for having, (after a previous conviction for uttering counterfeit coin), uttered a counterfeit crown piece at Manchester, on the 12th of December 1854, to *Jane Ann Needham*, knowing it to be counterfeit. The uttering a counterfeit crown on that day by the prisoner to *Jane Ann Needham* was proved. To prove guilty knowledge, the uttering of another mentioned in the indictment. The difference in the denomination of the coin goes to the weight of the evidence, but not to its admissibility.

counterfeit crown piece by the prisoner at *Manchester*, on the 11th of *December* 1854, was proved. The prisoner on that occasion on its being stated to her to be a bad crown piece, by the shopkeeper to whom it was given by her, said she would bring her husband and daughter to shew where she got it, and was permitted to depart on her promise to bring them, but she never returned. In order further to prove guilty knowledge on the part of the prisoner, the prosecutor offered to give evidence of a subsequent uttering by the prisoner of a counterfeit shilling on the 4th of *January*.

The Counsel for the prisoner objected that a subsequent uttering of a different species of counterfeit coin was not admissible to shew guilty knowledge at a prior time.

I had some doubt as to the propriety of receiving the evidence, and intimated that I should reserve the point for the consideration of the Judges if the evidence should be received and the prisoner convicted; and, considering the proof in the case, besides that of the subsequent uttering, I thought the evidence would have been withdrawn. But on the part of the Crown, it was stated that it was very desirable to have the point settled, as the case was of frequent occurrence in practice and considerable doubt was entertained upon it. I therefore received it.

The jury found the prisoner guilty, and voluntarily added that they found their verdict without considering the evidence of the subsequent uttering in the least. The prisoner was sentenced to four years' penal servitude. I pray the advice of the Judges (*a*).

This case was considered 28th of *April* 1855, by POLLOCK C. B., PARKE B., WIGHTMAN J., CROMPTON J. and CROWDER J.

(*a*) The learned Baron, at the foot of the case, referred to 1 Phill. on

Ev. 510; Taylor on Ev. 250; Roscoe on Crim. Ev. 35.

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1855. No Counsel appeared either for the Crown or for
the prisoner.

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PARKE B. intimated that the case was reserved, notwithstanding the finding of the jury, as Mr. Powell, the Solicitor to the Mint, had stated that the point which it involved was of frequent occurrence, and it was very desirable that it should be decided.

POLLOCK C. B.—If evidence is given upon a trial which is not properly admissible, the jury cannot make the reception of that evidence proper, by saying that they have not been influenced by it. In this case, however, we are of opinion that the evidence given was admissible to shew the guilty knowledge of the prisoner. In order to shew such guilty knowledge, it would not be sufficient merely to prove some other dishonest act; but here the uttering of the bad silver is so connected with the offence charged in the indictment, as to make the evidence of it admissible, although the coin was of a different denomination. The difference in the denomination of the coin goes to the weight of the evidence, but does not affect its admissibility.

The other learned Judges concurred.

Conviction affirmed.

REGINA v. HENRY OATES.

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THE following case was reserved by *Wilson Overend* Esquire, Chairman of the General Quarter Sessions for the West Riding of *Yorkshire*, for the opinion of the Court of Criminal Appeal.

The defendant, *Henry Oates*, was indicted at the adjourned *Christmas Sessions*, held at *Sheffield*, for the West Riding of *Yorkshire*, on the 27th of *February* 1855, for obtaining money under false pretences under the following indictment.

West Riding of Yorkshire, to wit.] The jurors for our lady the Queen upon their oath present that *Henry Oates* on the fourth day of *November* in the year of our Lord one thousand eight hundred and fifty-four unlawfully knowingly and designedly did falsely pretend to one *John Roberts Spencer* that he the said *Henry Oates* having executed for one *William Spencer* and the said *John Roberts Spencer* a certain lot and quantity of work there was then due and payable to him the said *Henry Oates* from and by the said *William Spencer* and *John Roberts Spencer* for and on account of the said lot and quantity of work a certain sum of money to wit the sum of six shillings being parcel of a certain larger sum of money to wit the larger sum of sixteen shillings and seven pence then claimed by the said *Henry Oates* in payment for the said lot and quantity

him the whole amount of a sum of money for and on account of certain work executed by him; whereas there was not then "due and owing" to him the whole amount of such sum of money, but only a smaller sum. *Held*, that the indictment was bad, inasmuch as a false pretence of an existing fact was not sufficiently alleged, and the averments would be proved by evidence of a mere wrongful overcharge.

In an indictment for obtaining money by false pretences, the pretence averred in some of the counts was, that the prisoner falsely pretended that he having executed certain work there was a certain sum of money "due and owing" to him for and on account of the work, being parcel of a larger sum claimed by him; whereas there was not then "due and owing" to him such money being parcel of a larger sum. The false pretence averred in other counts was, that the prisoner falsely pretended that there was "due and owing" to

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of work by means of which said false pretence the said *Henry Oates* did then unlawfully obtain from the said *John Roberts Spencer* a certain sum of money to wit the sum of six shillings of the moneys and property of the said *William Spencer* and *John Roberts Spencer* with intent thereby then to defraud whereas in truth and in fact there was not then due and payable to him the said *Henry Oates* the said sum of money to wit the sum of six shillings being parcel of the said larger sum of sixteen shillings and seven pence from and by the said *William Spencer* and *John Roberts Spencer* for and on account of the said lot and quantity of work to the great damage and deception of the said *John Roberts Spencer* to the evil example of all others in like case offending against the form of the statute in such case made and provided and against the peace of our lady the Queen her crown and dignity.

And the jurors aforesaid upon their oath aforesaid do further present that the said *Henry Oates* on the sixteenth day of *December* in the year of our Lord one thousand eight hundred and fifty-four unlawfully knowingly and designedly did falsely pretend to the said *William Spencer* that there was then due and owing to him the said *Henry Oates* from the said *William Spencer* and *John Roberts Spencer* a certain sum of money to wit the sum of one shilling being parcel of a certain larger sum of money to wit the larger sum of nineteen shillings and nine pence for and on account of a certain lot and quantity of work then executed by him the said *Henry Oates* for the said *William Spencer* and *John Roberts Spencer* by means of which said false pretence the said *Henry Oates* did then unlawfully obtain from the said *William Spencer* a certain sum of money to wit the sum of one shilling of the moneys and property of the said

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William Spencer and John Roberts Spencer with intent thereby then to defraud whereas in truth and in fact there was not then due and owing to him the said *Henry Oates* the said sum of money to wit the sum of one shilling being parcel of the said larger sum of money to wit the larger sum of nineteen shillings and nine pence from the said *William Spencer and John Roberts Spencer* for and on account of a certain lot and quantity of work to the great damage and deception of the said *William Spencer* to the evil example of all others in the like case offending against the form of the statute in such case made and provided and against the peace of our lady the Queen her crown and dignity.

And the jurors aforesaid upon their oath aforesaid do further present that the said *Henry Oates* on the sixth day of *January* in the year of our Lord one thousand eight hundred and fifty-five unlawfully knowingly and designedly did falsely pretend to the said *William Spencer* that there was then due and owing to him the said *Henry Oates* from the said *William Spencer and John Roberts Spencer* the whole amount of a sum of money to wit the whole sum of nineteen shillings for and on account of a certain lot and quantity of work then executed by him the said *Henry Oates* for the said *William Spencer and John Roberts Spencer* by means of which said false pretence the said *Henry Oates* did then unlawfully obtain from the said *William Spencer* a certain sum of money to wit the sum of ten shillings of the moneys and property of the said *William Spencer and John Roberts Spencer* with intent thereby then to defraud whereas in truth and in fact there was not then due and owing to him the said *Henry Oates* the whole amount of the said sum of money to wit the sum of nineteen shillings but only the smaller sum of

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money to wit the sum of nine shillings parcel thereof for and on account of a certain lot and quantity of work from the said *William Spencer* and *John Roberts Spencer* to the great damage and deception of the said *William Spencer* to the evil example of all others in the like case offending against the form of the statute in such case made and provided and against the peace of our lady the Queen her crown and dignity.

And the jurors aforesaid upon their oath aforesaid do further present that the said *Henry Oates* on the thirteenth day of *January* in the year of our Lord one thousand eight hundred and fifty five unlawfully knowingly and designedly did falsely pretend to the said *John Roberts Spencer* that there was then due and owing to him the said *Henry Oates* the whole amount of a certain sum of money to wit the sum of seventeen shillings and eleven pence from the said *William Spencer* and *John Roberts Spencer* for and on account of a certain lot and quantity of work done and executed for the said *William Spencer* and *John Roberts Spencer* by the said *Henry Oates* by means of which said false pretence the said *Henry Oates* did then unlawfully obtain from the said *John Roberts Spencer* a certain sum of money to wit the sum of six shillings of the moneys and property of the said *William Spencer* and *John Roberts Spencer* with intent thereby then to defraud whereas in truth and in fact there was not then due and owing to him the said *Henry Oates* the whole amount of the said sum of money to wit the sum of seventeen shillings and eleven pence from the said *William Spencer* and *John Roberts Spencer* but only a smaller sum of money to wit the smaller sum of eleven shillings and eleven pence for and on account of the said lot and quantity of work to the great damage and deception of the said *John Roberts Spencer* to

the evil example of all others in the like case offending against the form of the statute in such case made and provided and against the peace of our lady the Queen her crown and dignity.

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And the jurors aforesaid upon their oath aforesaid do further present that the said *Henry Oates* on the twentieth day of *January* in the year of our Lord one thousand eight hundred and fifty-five unlawfully knowingly and designedly did falsely pretend to the said *William Spencer* that there was then due and owing to him the said *Henry Oates* the whole amount of a certain sum of money to wit the sum of eighteen shillings and seven pence from the said *William Spencer* and *John Roberts Spencer* for and on account of a certain lot and quantity of work done and executed for the said *William Spencer* and *John Roberts Spencer* by the said *Henry Oates* by means of which said false pretence the said *Henry Oates* did then unlawfully obtain from the said *William Spencer* a certain sum of money to wit the sum of five shillings of the moneys and property of the said *William Spencer* and *John Roberts Spenceer* with intent thereby then to defraud whereas in truth and in fact there was not then due and owing to him the said *Henry Oates* the whole amount of the said sum of money to wit the sum of eighteen shillings and seven pence from the said *William Spencer* and *John Roberts Spencer* but only a smaller sum of money to wit the sum of thirteen shillings and seven pence for and on account of the said lot and quantity of work to the great damage and deception of the said *William Spencer* to the evil example of all others in the like case offending against the form of the statute in such case made and provided and against the peace of our lady the Queen her crown and dignity.

And the jurors aforesaid upon their oath aforesaid do

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further present that the said *Henry Oates* on the third day of *February* in the year of our Lord one thousand eight hundred and fifty-five unlawfully knowingly and designedly did falsely pretend to the said *William Spencer* that there was then due and owing to him the said *Henry Oates* the whole amount of a certain sum of money to wit the sum of fifteen shillings and six pence from the said *William Spencer* and *John Roberts Spencer* for and on account of a certain lot and quantity of work done and executed for the said *William Spencer* and *John Roberts Spencer* by the said *Henry Oates* by means of which said false pretence the said *Henry Oates* did then unlawfully obtain from the said *William Spencer* a certain sum of money to wit the sum of five shillings of the moneys and property of the said *William Spencer* and *John Roberts Spencer* with intent thereby then to defraud whereas in truth and in fact there was not then due and owing to him the said *Henry Oates* the whole amount of the said sum of money to wit the sum of fifteen shillings and six pence from the said *William Spencer* and *John Roberts Spencer* but only a smaller sum of money to wit the sum of ten shillings and six pence for and on account of the said lot and quantity of work to the great damage and deception of the said *William Spencer* to the evil example of all others in the like case offending against the form of the statute in such case made and provided and against the peace of our lady the Queen her crown and dignity.

It was proved that the defendant worked for the prosecutors as a journeyman, and that the quantities of work done by him for them during each week were entered in a book kept exclusively for that purpose.

The prices for the work so entered were placed in a

column opposite to each quantity of work, and were added up on behalf of the prosecutors at the end of each week. The weekly totals of these prices were entered by them in this book, and the amount of those totals were paid by them to the defendant as the ascertained sum of money due to him for work done on the production by him of this book. It was further proved that, after these weekly totals had been entered as above, the defendant had altered them into larger amounts, and then had procured payment of those larger amounts on producing the books, and had afterwards erased the larger amounts and restored the figures of the original totals. The defendant was found guilty. After verdict had^d been recorded it was objected on the part^s of the defendant that the counts of the above indictment did not disclose any false pretence under 7 & 8 Geo. 4, c. 29. The Court held that the objection was a good one, and arrested^(a) the judgment in order that a case might be stated for the decision of the Court of Criminal Appeal, whether the indictment above set out discloses on its face any false pretence under the above statute.

This case was argued on the 28th of April 1855, before POLLOCK C. B., PARKE B., WIGHTMAN J., CROMPTON J. and CROWDER J.

J. B. Maule appeared for the Crown, and *A. J. Johnston* for the prisoner.

A. J. Johnston, for the prisoner. The indictment is bad upon the face of it, as it does not shew that there was any false pretence of an existing fact. It is not

(a) The Court of Criminal Appeal acted in this case on the assumption that the word "arrested" was inserted by mistake for "resisted;" and I have since ascertained from

Mr. *Maule*, the Counsel for the prosecution at the sessions, that the judgment was not in fact arrested in the Court below.—H. R. D.

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1855. alleged in any of the counts that the prisoner pretended that work had been done which had not, in fact, been done, and the only false pretence alleged is that more money was due and owing than was really due. The attention of the Court of Quarter Sessions was not called to the case of *Regina v. Woolley* (*a*). In that case the application of the statute was pushed further than in any other case, but I think I can distinguish it from the present. It is true that Lord CAMPBELL said in that case, that if a tradesman, knowing that a customer owes him nothing whatever, says that he owes him 5*l.*, and gets the money, he comes within the statute; but even assuming that that is so, it is not the case here. It is not denied that there was some money due to the defendant, and his statement is simply an overcharge.

The first count of the indictment in *Reg. v. Woolley* states, that the prisoner was secretary to a lodge of which the prosecutor was a member; that the prosecutor was indebted to the lodge in two shillings and twopence, and that the defendant falsely pretended that a larger sum was due from the prosecutor to the lodge. There is this distinction between that case and this, that there the fact was peculiarly in the knowledge of the prisoner who, as secretary, kept the accounts of the lodge; and it is also to be observed that the attention of the Court does not appear to have been directed to the form of the indictment.

The first count of the indictment in *Regina v. Leonard* (*b*), which was held by the fifteen Judges to be good in form, alleged that the defendant, a servant of the prosecutor, unlawfully and falsely pretended that a certain account kept by him (the defendant) was a true and correct account, and that a certain sum was

(*a*) 1 Den. Cr. Ca. 559.

(*b*) 2 Carr. & Kér. 514.

then due in respect of work performed for and on account of the prosecutor; but that count, as will be seen, was framed on specific facts which themselves constituted a false pretence; here the indictment shews no false account, no false allegation that work was done, but simply a claim of a certain sum as due and owing from the prosecutor to the defendant. The case of *Hamilton v. Regina* (*a*), in error, is also distinguishable from this. There the indictment charged that the defendant did falsely pretend that he, the defendant, then was a captain in her Majesty's 5th regiment of Dragoons. There was, therefore, in that case a false pretence of an existing fact.

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J. B. Maule, for the Crown. The facts in *Regina v. Woolley* (*b*) were simply these. There was a certain sum due from the prosecutor to the club of which the defendant was secretary, but the defendant asked for a great deal more, and it was unsuccessfully contended that that was simply a representation of the existence of a debt. The language of Lord CAMPBELL C. J. in that case was very strong, and it was in answer to this question put by the Counsel for the prisoner, "If *A.* tells *B.* that he owes him 5*l.*, and *B.*, though really owing him nothing, pays him 5*l.*, is that a false pretence?" that his Lordship said, "If a tradesman, knowing that a customer owes him nothing whatever, says that he owes him 5*l.*, and gets the money, I think he comes within the statute." Now here is a demand of a sum in excess of what was really due, and it cannot be distinguished in principle from the case put by Lord CAMPBELL, because the defendant had a legitimate claim for part of the sum demanded. In *Regina v. Woolley* the demand was in writing, but there is no difference between a demand

(*a*) 9 Q. B. 271.

(*b*) 1 Den. Cr. Ca. 559.

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made in writing and one made *ore tenus*. Nor does the indictment in this case appear to be distinguishable in principle from the first count of the indictment in *Regina v. Leonard* (*a*), which was held to be good.

WIGHTMAN J. referred to the case of *Rex v. Reed* (*b*).

MAULE J.—In *Hamilton v. Regina* (in error) (*c*), Lord Denman C. J. said, “I am sure that *Rex v. Reed* was not before the Judges. That decision is not overruled now; for it never took place.”

POLLOCK C. B.—The decisions when *Rex v. Reed* was said to have been considered by the Judges were certainly not of so much weight as now, when these cases are decided publicly and Counsel heard on both sides.

CROMPTON J.—These cases can generally be resolved into the representation of an existing fact; but my difficulty here is to see what you mean by “due and owing.”

MAULE J.—The allegation in the indictment being in effect that the defendant made a statement that a debt was due and owing to him, knowing that statement to be false and for the purpose of effecting a fraud, it excludes the idea of a disputed account, or that what is due and owing is a conclusion of law, and amounts to a false statement that a debt was existing.

PARKE B.—If the prisoner had said that so much work had been done, when it had not, this case might have been like *Regina v. Leonard*, being a false statement of a fact and not a false estimate. Where the demand is on a *quantum meruit*, and a false and fraudulent estimate is made, I doubt if that is within the statute; and all these counts might be supported

(*a*) 2 Car. & Kir. 514.

(*b*) 7 Car. & P. 848.

(*c*) 9 Q. B. 271.

by evidence of what would be nothing more than a false and fraudulent over-estimate of the value of the work.

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MAULE J. referred to *Regina v. Woolley* (*a*).

PARKE B.—That case was decided on the facts only. The form of the indictment was not considered. It was not in arrest of judgment, or there might have been some doubt.

Johnston, in reply. The work done was ascertained, and the false claim is in respect of the value of that work. The existing fact is true, and the alleged false statement is merely an estimate of the unascertained value of the ascertained work.

POLLOCK C. B.—The decision in *Regina v. Woolley* (*b*), in the first instance, seemed to be an authority in favour of an indictment such as this; but, as my brother PARKE observed during the argument, in that case the attention of the Court was not called to the form of the indictment, but only to the facts. If a man is in the habit of selling a particular article for 12*s.*, and charges 15*s.* for it, it is a mere overcharge, and cannot be made the subject of an indictment for obtaining money by false pretences. Considering this as an allegation merely that so much was "due and owing," it may involve many questions both of law and fact. It may involve the price to be paid, the value of the work, the credit to be given, and the terms of payment. The allegation of a false pretence should be clear and precise, in order that you may see upon the face of the indictment whether it discloses a false statement of an existing fact. We think the indictment in this case cannot be sustained, and I cheerfully concur in this judgment, because I think the statute was never intended to extend to cases where the

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transaction between the parties is really one of buying and selling, although there may be a degree of fraud in the representations made by the vendor.

PARKE B.—An indictment for false pretences must disclose a false pretence of an existing fact. In this case there is merely a fraudulent claim in respect of a *quantum meruit* of the prisoner's work and labour; and the indictment would be supported by evidence that the prisoner made a false estimate of the value of his work. I do not think that is an indictable offence. The short ground of my judgment is, that the indictment contains no false statement of an existing fact. The decision in *Regina v. Woolley (a)* went wholly on the facts, and the form of the indictment was not considered by the Court. In this case the false pretence consists of nothing more than what might be mere matter of opinion, and it would be frightful if every person who made an overcharge should be liable to a criminal prosecution.

WIGHTMAN J.—I am of the same opinion. To constitute a false pretence there must be a statement of a particular existing fact. Here it is merely said that the defendant falsely pretended that a certain sum of money was due and owing; and this indictment might be supported by evidence of a mere overcharge. In *Regina v. Woolley (a)* the indictment was open to the same objection, but that case was reserved on the facts, and the Court did not consider the form of the indictment; here, on the contrary, the facts are not before us, but merely the form of the indictment.

CROMPTON J.—I am of the same opinion. The indictment avers no misrepresentation of an existing fact, but merely a false representation that a certain sum was due and payable, and that averment might

be proved by evidence of a wrongful overcharge, or a misrepresentation of a matter of law. The false statement that money is due and payable, does not necessarily involve a false pretence of an existing fact.

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CROWDER J.—I am of the same opinion. Our attention is called to the form of the indictment, and to that alone; and it is consistent with the language of the indictment that there might not have been a false representation of an existing fact, but only a false estimate of the value of the work, and I am not prepared to say that that would be the subject of an indictment. *Regina v. Woolley* is not in point. There the Court looked to the facts only, and not to the form of the indictment.

Conviction quashed.

LR 101 Feb 24 1855

REGINA v. JANE PERRY.
SC 6 Cir 531

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THE following case was reserved for the opinion of the Court of Criminal Appeal by Mr. Baron MARTIN.

Jane Perry was indicted for the murder of her bastard child. There was no evidence of the murder, but it was proved by a surgeon that he was sent for by the members of the family where the prisoner lived as servant, in consequence of her illness; that upon seeing her he suspected she had just given birth to a child, and examined her person, and found she had assumed in the case that she meant to remove the body elsewhere when an opportunity occurred. Held, (POLLOCK C. B. *dissentiente*), that she was upon these facts properly convicted of endeavouring to conceal the birth of the child by secretly disposing of the dead body, as it is not necessary in order to constitute that offence under 9 Geo. 4, c. 31, s. 14, that the body should be put in a place which is intended to be the place of its final deposit.

The prisoner, the mother of a child of which she had been recently delivered, with the intention of concealing the dead body of the child from a surgeon, placed it under a bolster on which she laid her head. It was

1855. been recently delivered, and asked her several questions on the subject, but could get no satisfactory answer. He then went out of the room, leaving the prisoner alone lying on the bed. He immediately heard the door being locked and returned to it, and insisted upon its being opened, which the prisoner did, and was returning to the bed as the surgeon entered. When he arrived at the bedside she had laid down her head upon the bolster, and was pulling the bed clothes over her person, and he then found the dead body of the child under the bolster with her head partly over it. He asked her where the child had been before, but could get no answer. The question I desire to be answered by the Court is, whether, assuming that the prisoner placed the dead body of the child under the bolster with the intention of endeavouring, as far as she could, to conceal the body from the surgeon, it was such a disposing of the dead body as to be an offence within the 9 Geo. 4, c. 31, s. 14. It may be assumed that she intended to remove the body to some other place when an opportunity offered.

If the Court think it was not an offence they will please order the prisoner to be discharged, as I respited her until the opinion of the Court was obtained.

This case was considered on the 28th of April 1855, by POLLOCK C. B., PARKE B., WIGHTMAN J., CROMPTON J. and CROWDER J.

No Counsel appeared either for the Crown or for the prisoner.

The learned Judges retired to consider the case. POLLOCK C. B. did not return into the Court when judgment was delivered.

PARKE B.—The Lord Chief Baron differs from the rest of the Court, and thinks that this case does not shew a disposition of the body of the child within the

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meaning of the statute ; but he does not wish the case to be reserved for argument before all the Judges (*a*). The rest of the Court think that there was such a disposition as is within the statute. It has been already decided, and that decision has been since acted upon, that the words “secret burying or otherwise disposing of the body” do not require that the body should be put in some place which is intended to be the place of its final deposit. In *Regina v. Goldthorpe* (*b*) it was decided, that hiding the dead body of a child between the bed and the mattress was a sufficient disposition of the body within the meaning of the statute. There is no difference between that case and the present. There is clearly a disposing of the body, and no one can suppose that the prisoner did not mean thereby to conceal the body and prevent inquiry. The body was not put in a final place of deposit, but that is not necessary ; and there was a secret disposal of it within the statute.

WIGHTMAN J.—It has already been decided that a final disposition is not necessary, but that a temporary disposition is sufficient to constitute the offence.

CROMPTON J. concurred.

CROWDER J.—I am of the same opinion. A temporary disposition of the body in order to conceal the birth is sufficient. Besides the decision in *Regina v. Goldthorpe*, there are the cases of *Regina v. Farnham* (*c*), and *Regina v. Hughes* (*d*), and it is now too late to construe the words “secret burying, or otherwise disposing of the body” as applying only to the place of final deposit.

Conviction affirmed.

(*a*) In a note to *Regina v. Wiley*, 2 Den. Cr. Ca. 49, it is stated that the Judges had resolved that whenever the Court of Criminal Appeal were not unanimous, the case should be brought before the consideration

of the whole Bench.

(*b*) 2 Mood. Cr. Ca. 244 ; S. C. Car. & Mar. 335.

(*c*) 1 Cox Cr. Ca. 349.

(*d*) 4 Cox Cr. Ca. 447.

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REGINA v. WILLIAM FROST AND JOHN RUSSELL.

In an indictment, under 9 Geo. 4, c. 69, s. 2, for assaulting a gamekeeper of the Duke of Cambridge, the Duke was described as "George William Frederick Charles Duke of Cambridge." It was proved on the trial that "George William" were two of his Christian names, but that he had other Christian names which were unknown to the witnesses and were not proved. The jury found a verdict of guilty, and stated that they were satisfied with the evidence of the identity of the Duke. Held, 1. That the conviction was

THE following case was reserved for the opinion of the Court of Criminal Appeal by *Thomas Puckle* Esquire, Chairman of the General Quarter Sessions for the county of *Surrey*.

At the General Sessions of the Peace of our lady the Queen holden at *St. Mary, Newington*, in and for the county of *Surrey*, on *Tuesday the 2nd day of January*, in the year of our Lord 1855, *William Frost* and *John Russell* were tried and convicted of an assault upon a gamekeeper under the following indictment.

Surrey.] The jurors of our lady the Queen upon their oath present that at the time of the committing of the assault hereinafter mentioned to wit on the ninth day of *December* in the year of our Lord one thousand eight hundred and fifty-four in the night time to wit about the hour of twelve in the night of the same day *William Frost* and *John Russell* were unlawfully upon certain land in the occupation of one *George William Frederick Charles Duke of Cambridge* situate at the parish of *Kingston upon Thames* in the county of *Surrey* armed with a gun and with certain bludgeons and sticks and other offensive weapons for the purpose of then and by night as aforesaid un-

wrong, as matter of description in an indictment, though unnecessarily alleged, must be proved as laid. 2. That the Court of Quarter Sessions were not bound to amend at the trial; but that, under the 14 & 15 Vict. c. 100, s. 24, they might in their discretion have made an amendment by which the conviction would have been supported, by striking out all the Christian names. 3. That an amendment by striking out only the two names which were not proved, would have been wrong. 4. That all amendments should be made before a case goes to the jury. 5. That it was now too late to amend.

lawfully taking and destroying game and that the said *William Frost* and *John Russell* were then so being upon the said land by night as aforesaid armed with the said gun bludgeons and sticks and other offensive weapons for the purpose aforesaid by one *Henry Edson* the servant of the said *George William Frederick Charles Duke of Cambridge* the said *Henry Edson* then having lawful authority to seize and apprehend the said *William Frost* and *John Russell* found and that he the said *Henry Edson* being then about to seize and apprehend the said *William Frost* and *John Russell* for the offence aforesaid the said *Henry Edson* then having lawful authority so to do they the said *William Frost* and *John Russell* with the gun aforesaid and with the bludgeons and sticks and other offensive weapons aforesaid which they the said *William Frost* and *John Russell* in their hands then held did then unlawfully assault and beat the said *Henry Edson* against the form of the statute in such case made and provided and against the peace of our said lady the Queen her crown and dignity.

At the trial none of the witnesses were able to prove the Christian names of the Duke of *Cambridge* as laid in the indictment and found by the grand jury. One witness only swore that *George William* were two of the Christian names of the said Duke; that he believed the said Duke had some other Christian names, but he could not say what they were. Upon this it was moved by the Counsel for the prisoners, upon the authority of *The Queen v. The Earl of Cardigan*, that as the Christian names of the Duke of *Cambridge* had not been proved as laid in the indictment, the Court should direct an acquittal of the prisoners. On the other hand it was moved by the Counsel for the prosecution, that the Court should amend the indictment under stat.

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14 & 15 Vict. c. 100, by striking out the words
“*Frederick Charles.*”

The Court refused to amend the indictment because no sufficient evidence was offered to enable it to do so; and the Court also refused to direct an acquittal, but left it to the jury to say whether they were satisfied by the evidence of the identity of the said Duke of *Cambridge* as occupier of the land in question, and as master of the said *Henry Edson*, in which event they, the jury, would consider the case upon its merits generally, and give their verdict accordingly. The jury thereupon, after a short consultation, brought in a verdict of guilty generally against both the prisoners, alleging at the same time that they were satisfied with the evidence of the identity of the said Duke.

The Court reserved the following two points for the consideration of the Justices of either Bench and Barons of the Exchequer. First, whether it was bound to amend the indictment, upon the insufficient evidence above mentioned, by striking out the two Christian names of the said Duke of *Cambridge*, viz. *Frederick* and *Charles*, which had been found by the grand jury, and respecting which no evidence whatever was given at the trial. And secondly, whether, having refused to amend, the Court acted properly in submitting the case to the jury in the manner above mentioned.

The Court postponed the judgment, and committed the said *William Frost* and *John Russell* to prison until such questions should have been considered and decided.

This case was argued on the 28th of April 1855, before POLLOCK C. B., PARKE B., WIGHTMAN J., CROMPTON J. and CROWDER J.

Robinson appeared for the Crown, and *Charnock* for the prisoners.

Charnock read the case, and stated the questions for the consideration of the Court. He relied upon *Lord Cardigan's case* (a). He was then stopped by the Court.

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Robinson, for the Crown. It is submitted that the sessions ought to have amended, and that the whole of the Christian names may be disregarded as surplusage. The rule as to strict proof of matter of description is for the purpose of enabling a defendant to plead *autrefois acquit*; but here the identity of the Duke was expressly found by the jury. *Reg. v. Gregory* (b) is an authority in my favour. There the prosecutor was in a criminal information described as His Serene Highness *Charles Frederick Augustus William Duke of Brunswick and Luneburg*. His name was *Charles Frederick Augustus William D'Este*; and, although he had formerly been reigning Duke of *Brunswick* and *Luneburg*, and was still commonly called by that title, he had ceased to be reigning Duke *de facto*; and the Court of Queen's Bench held that the description in the information was sufficient.

PARKE B.—The evidence here is that the Duke of *Cambridge* had two of the Christian names alleged in the indictment, and other names which were not proved. If there had been evidence that the Duke was known by some other Christian name than those alleged in the indictment, the Sessions might have amended, but they were not bound to amend.

Robinson. All the Christian names are surplusage, and may be struck out; and if the Christian names be omitted altogether, the words "Duke of *Cambridge*" will stand alone in the indictment as a descriptive appellation, and will be sufficient. By

(a) Dom. Proc. 1841, 1 Town-
send's Moo. State Trials, 212;
S. C. Reports published by order of House of Lords, 1841.
(b) 8 Q. B. 508.

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the 14 & 15 Vict. c. 100, s. 24, it is provided, that no indictment shall be held insufficient for that any person in it is designated by a name of office, or other descriptive appellation, instead of his proper name. But before that statute there were several decisions, on the authority of which the Court of Queen's Bench acted in *Regina v. Gregory* (a). In *Rex v. Sulls* (b), in an indictment for larceny, the goods stolen were laid as the property of *Victory Baroness Turkheim*: on it being proved that the prosecutrix did possess the title of Baroness *Turkheim*, the indictment was held sufficient, although it was also proved that the name of the prosecutrix without her title was *Selina Victoire*. In *Regina v. Pitts* (c) it was held by *Erskine J.*, that in an indictment for larceny of goods, the property of a peer who is a baron, the goods were not properly laid as the goods and chattels of "G. T. R. Lord D." without styling him *Baron D.*, as the proper way to describe a peer is by his Christian name and his degree in the peerage, as Duke, Earl, Baron, or the like; but in a note to that case it is stated that in *Regina v. Elliott* (d), at the same assizes, the defendant was indicted for entering, with two others, armed, &c., on land of "The Right Honorable William Fitzhardinge Lord Segrave," and the same objection was taken, when *Erskine J.* said that he had great doubt about the correctness of his ruling in the case of *Regina v. Pitts*; and the learned reporters go on to state that they have the authority of that learned Judge for stating, that upon further consideration, and on consultation with the other Judges, he was satisfied that the description in both indictments was sufficient. In *Rex v.*

(a) 8 Q. B. 509.

(b) 2 Leach's Cr. Ca. 861.

(c) 8 Carr. & P. 771.

(d) Note to *Reg. v. Pitt*, Carr. & P. 772.

Graham (*a*), where the property was laid in the indictment as the property of *James Hamilton Esq.*, commonly called the Earl of *C.*, the Court, in the exercise of their common law jurisdiction, held that the words "commonly called" might be rejected as surplusage.

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Then, since the statute 14 & 15 Vict. c. 100, there is the case of *Regina v. Sturge* (*b*). There an indictment for obstructing a highway described it as a footway leading from *A.* to *B.* It appeared in evidence that the way in question passed from *A.* to *B.*, through *C.*, and that from *A.* to *C.* it was a carriage way, and from *C.* to *B.* only a footway. The obstruction complained of was between *C.* and *B.*, and on the objection that this was a misdescription of the way, a verdict was entered for the defendant, but the Court of Queen's Bench directed that a verdict should be entered for the Crown, Lord CAMPBELL C. J. saying that the 14 & 15 Vict. c. 100 was meant to apply to all cases where amendments may be made in the furtherance of justice.

CROMPTON J.—In that case leave was reserved to enter a verdict for the Crown, if the Court above thought an amendment ought to be made.

Robinson. As to the question of identity I presume that, for the purpose of ascertaining that question, your Lordships would, if necessary, take judicial notice of the fact that there is and can be but one Duke of *Cambridge* in this country. But the identity was for the jury, *Regina v. Davis* (*c*); and they expressly found that the owner of the land and the master of the gamekeeper who apprehended the defendant, was the person named in the indictment.

(*a*) 2 Leach's Cr. Ca. 547.

(*b*) 23 Law Jour. M. C. 173.

(*c*) 2 Den. Cr. Ca. 231.

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POLLOCK C. B.—We are all of opinion that the conviction is bad, and that the prisoners must be discharged. It is a general rule of law that whatever is laid as matter of description, must be proved as laid. The Duke of *Cambridge* is here described as *George William Frederick Charles*, and none of the witnesses called proved that those were his names. The case of Lord *Cardigan* is directly in point, and we cannot overrule it. We are asked if the Court of Quarter Sessions were bound to amend. They certainly were not. When an amendment is asked, the Court must exercise their discretion. They could not have properly amended this indictment, except by striking out all the Christian names. They might have done that, but certainly were not bound to do so; and no amendment having been made, the prisoners ought to have been acquitted.

PARKE B.—I am entirely of the same opinion. The Court are never bound to amend in any case, although they have under the statute power to do so; and whether they ought to have amended in this particular case is an idle question, because it is now too late to do so. As it was, they were quite right not to make an amendment in the manner in which they were asked to make it; but they would clearly have been wrong if they had been applied to to strike out the Christian names altogether, and leave the prosecutor described by his name of office as the Duke of *Cambridge*, and had refused to do so. But, after verdict, the questions whether the Court should have or could have amended are unimportant, since any amendment that is made ought to be made before the case is allowed to go to the jury, it being the business of the jury to give their verdict *secundum allegata et probata*; and their verdict must be pronounced upon the indictment as amended. This

indictment, not being amended, stands with all the Christian names in it, and this being matter of description, the prosecutor was bound to prove, not that the Duke was owner of the land, but that the owner had the title and the Christian names alleged, though unnecessarily, in the indictment.

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WIGHTMAN J.—I am clearly of opinion that so long as the indictment contained the Christian names the prosecutor was bound to prove them as laid. The case of the *Earl of Cardigan* is not to be distinguished from the present on that point. I am also of opinion, that although the sessions might have amended by striking out all the Christian names, and, if they had so amended, the allegations in the indictment would have been proved by the evidence; still, they were not under any legal obligation to do so. It is now, however, unimportant to consider the question of amendment, as all amendments must be made in the Court where the record is before verdict.

CROMPTON J.—I am of the same opinion. The names being matter of description, must be proved as laid. It is important that it should be understood that, if an amendment be made at all, it should be made before verdict, as the jury must find their verdict upon the pleadings as amended, and *secundum allegata et probata*.

CROWDER J.—I agree also with the rest of the Court. The Court of Quarter Sessions was not bound to amend at all, and ought not to have amended as proposed. If they had made any amendment at all, it ought to have been by striking out all the Christian names.

x Leigh & Caw 400

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REGINA v. JOHN RUNDLE.

The prisoner was tried and convicted on an indictment under 16 & 17 Vict. c. 96, s. 9, charging that he, having the care and charge of his wife, a lunatic, did abuse and ill-treat her; and also containing a count for a common assault. Held, that the prisoner was not a person having the care or charge of a lunatic within the meaning of the statute, inasmuch as its provisions were not intended to apply to persons whose care or charge arises from natural duty; and that so much of the conviction as related to the counts under the statute must be quashed.

THE following case was reserved for the opinion of the Court of Criminal Appeal, by Mr. Justice CROWDER.

The prisoner was tried before me at the *Devon* Spring Assizes, 1855, on an indictment framed upon the 16 & 17 Vict. c. 96, s. 9, which also contained a count for a common assault.

There were six counts upon the statute.

The first count charged that *John Rundle*, the prisoner, "had the care and charge of *Amelia* his wife, a lunatic," within the meaning of the statute, and that "he did abuse and ill-treat her," so being such lunatic.

The second count charged the same, substituting the words that he did "wilfully neglect," for the words "did abuse and ill-treat."

The third and fourth counts the same as the first and second, with the additional averment that he "well knew" her to be a lunatic.

The fifth and sixth counts the same as the first and second, substituting only an averment that the said *Amelia* was "a person alleged to be a lunatic," for the averment that she was a lunatic.

It appeared in evidence, that for some considerable time while the said *John* and *Amelia* were living together as man and wife she was a lunatic, and that he knew her so to be, and that during such time he abused, ill-treated, wilfully neglected and assaulted her. The jury found the prisoner guilty upon all the counts in the indictment.

No proceedings of any kind had been taken by any one in respect of the wife's lunacy or alleged lunacy.

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The point on which I desire the opinion of the Court of Criminal Appeal is, whether the prisoner, upon this evidence, was indictable under the 9th section of the said act as "a person having the care or charge of a lunatic, or of a person alleged to be a lunatic," within the meaning of the latter part of the said section?

I sentenced the prisoner to five months and one fortnight's imprisonment on the count for a common assault, and on each of the other counts to a fortnight's imprisonment concurrently, to commence at the expiration of the first five months and a fortnight. If the Court should be of opinion that the counts upon the statute cannot be sustained, then the sentence to stand only on the count for a common assault. If any one of the other counts be sustained, then the sentence to stand also for the additional fortnights upon such counts.

This case was argued on the 28th of April 1855, before POLLOCK C. B., PARKE B., COLERIDGE J., CROMPTON J. and CROWDER J.

Stock (*Karslake* with him) appeared for the Crown. No Counsel appeared for the prisoner.

Stock, for the Crown. The question in this case is as to the proper construction of the 9th section of the 16 & 17 Vict. c. 96, by which it is enacted, that "if any superintendent, officer, nurse, attendant, servant, or other person employed in any registered hospital or licensed house, or any person having the care or charge of any single patient, or any attendant of any single patient, in any way abuse or ill-treat, or wilfully neglect any patient in such hospital or house, or such single patient, or if any person detaining or taking,

1855. or having the care or charge, or concerned or taking part in the custody, care or treatment of any lunatic or person alleged to be a lunatic, in any way abuse, ill-treat, or wilfully neglect such lunatic or alleged lunatic, he shall be guilty of a misdemeanor." I have to satisfy the Court that a husband is within the words in the latter part of this section, and is guilty of the statutable offence if he ill-treats his wife knowing her to be a lunatic. The 16 & 17 Vict. c. 96 amends the 8 & 9 Vict. c. 100, and the two statutes are to be construed together as one act. Section 56 of the latter statute provides that ill-treatment of a patient shall be a misdemeanor; and section 90, by providing that no person, except a person deriving no profit, or a committee, shall take charge of a single lunatic, except upon a medical certificate, shews that the act intended to deal with a class of persons other than those having charge of hospitals and licensed houses. The earlier part of section 9 of the 16 & 17 Vict. c. 96 refers to persons employed in registered hospitals and licensed houses, and persons having the care or charge of single patients; and the words following, "any person detaining or taking, or having the care or charge," can only apply to cases where the care arises from the connection of husband and wife, father and child, or some similar relation. If they do not apply to such cases, it is difficult to give them any meaning at all.

POLLOCK C. B.—Might not persons bringing a lunatic before a Judge under a habeas corpus fall within the description, "any person detaining or taking, or having the care or charge?"

PARKE B.—The law obliges a husband to take care of his wife independently of her being a lunatic; he does not take care of her because she is a lunatic, but because she is his wife.

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Stock. If a husband is not included, then the absurdity follows, that a husband may put his lunatic wife under the charge of his next door neighbour, and the neighbour would be within the provisions of the statute, although the husband himself would not.

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PARKE B.—Yes, that would do. The person so employed would be a person undertaking the care and charge for hire.

Stock. The case not only finds that the wife was a lunatic, but that the husband knew her so to be.

POLLOCK C. B.—We are all of opinion that so much of the conviction and punishment as relates to the counts framed upon the statute cannot be sustained, because, looking to the provisions of the statutes which have been referred to in argument, it is very clear that the Legislature never intended to interfere with a care and charge which is purely of a domestic nature, and arises from the relation of husband and wife, or other similar relation. It was not intended to add to the common law obligations of the master or head of a family, who, whether husband, guardian, relative or otherwise, is liable to be punished if he ill-uses any person under his control. It is contended that all other classes of persons are exhausted by the earlier part of the 9th section, and therefore that if relatives are not included in the words "any person," there would be no class of persons upon whom those words could operate; but that is not so. All possible classes are not exhausted by the earlier part of section 9; persons bringing a lunatic up under a habeas corpus, and having the care and charge of him for that purpose, would fall within the words "any person;" but I do not think they were intended to apply to persons having a custody of a purely domestic character.

1855. PARKE B.—I am of the same opinion. The latter words of section 9 do not apply to persons who, having a natural duty to perform, have, as father, husband, or otherwise, merely the domestic custody of a lunatic. Such persons cannot be said to have the care or charge of a lunatic within the meaning of the statute.

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The other learned Judges concurred.

Conviction, so far as it related to the counts upon the statute, quashed.

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REGINA v. JAMES MACKAY KEITH.

The prisoner was tried and convicted on an indictment, framed upon the stat. 11 Geo. 4 & 1 Wm. 4, c. 66, s. 18, for engraving upon a plate part of

a promissory note, purporting to be part of the note of a banking company. It was proved in evidence that the prisoner, being possessed of a promissory note of the *B. L. Banking Company*, had cut out the centre of the note on which the whole promissory note was written; and had procured to be engraved upon a plate merely the royal arms of *Scotland* and the *Britannia* (which formed part of the ornamental border), the said arms and the *Britannia* being respectively placed upon the plate in the same position as that in which they would be found in a complete note of the company.

The case stated that upon the facts submitted to the jury, the prisoner was rightly convicted subject to the question, whether such an engraving satisfied the words of the statute, as being an engraving upon a plate of "part of a bill of exchange or promissory note purporting to be part of the bill or note."

Held, 1. That it did, as every part of what usually circulates as a note, the ornamental border as well as the obligatory words, is part of the note "within" the meaning of the statute.

2. That in order to ascertain whether that which was engraved on the plate "purported" to be part of the note, extrinsic evidence was admissible; and that, for that purpose, the jury might compare the plate with a genuine note of the company.

facts submitted to the jury he was, subject to the following question, rightly convicted. I passed sentence on him, but having doubts whether on one point the charge could be sustained, I reserved that question for the opinion of the Judges.

The prisoner being possessed of a one pound note of the *British Linen Banking Company*, had cut out the centre part on which the whole of the promissory note was written, and taken the ornamental border to *Kynaston*, a printer at *Birmingham*, representing that he wanted to have a plate made of this border, intending to fill up the centre with the title of some oil or cosmetic of which the firm in whose employ he represented himself to be were the vendors.

Kynaston was not an engraver, and told him that he (*Kynaston*) must employ another hand to execute the royal arms of *Scotland* and the *Britannia*, which formed part of this border, to which the prisoner assented. Accordingly, an engraver of the name of *Umfreville* was applied to, who perceived at once the prisoner's real purpose; and, having caused, through the police, a communication to be made to the banking company, undertook the work with their authority, and made a plate, an impression from which I annex to this case (a), which was delivered to the prisoner, and he was apprehended with it in his possession.

The words of the section are as follows: "If any person shall engrave or in anywise make upon any plate whatever any bill of exchange or promissory note for the payment of money; or any part of any bill of exchange or promissory note for the payment of money purporting to be the bill or note; or part of

(a) The impression from the plate annexed to the case, shewed that the royal arms of *Scotland* and the *Britannia* respectively occupied the

same place on the plate as they would in an original note of the company.

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1855. the bill or note of any person or persons, body corporate or company carrying on the business of bankers (other than and except the Bank of *England*), without the authority of such person or persons, body corporate or company," &c.

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I doubted whether a plate having on it merely the royal arms of *Scotland* and the *Britannia*, although placed as they are found in a complete promissory note of the banking company, satisfied these words, and request the opinion of the Judges thereon.

This case was argued on the 28th of April 1855, before POLLOCK C. B., PARKE B., COLERIDGE J., CROMPTON J. and CROWDER J.

Bittleston appeared for the Crown. No Counsel appeared for the prisoner.

Bittleston, for the Crown. The doubt entertained by the learned Judge who reserved this case was as to the meaning of the word "purporting" in the 18th section of the statute; and it is on the part of the prosecution contended, that although the decoration of the note does not, apart from the residue of that which appears on the face of the note, shew that it is a part of such note, the conviction may nevertheless be sustained. The parts here engraved are the royal arms of *Scotland* at the head, and the figure of *Britannia* on the left hand, and they purport to be part of a promissory note of the company. Whether this engraving purported to be part of a genuine note was a question for the jury. It is not necessary, in order to satisfy the statute, that the parts engraved should be such parts of the note as are required to give it validity; but it is sufficient if any part is engraved which, with the addition of other parts, would resemble and purport to be a genuine note.

In *Regina v. Faderman* (*a*), one of the plates contained a part of the foreign bill or note which was a mere picture (*b*), and the particular words in the 18th section of the statute, upon which this indictment proceeds, are the same as those in the 19th section of the same statute, which was the section relied upon in *Regina v. Faderman* (*a*).

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POLLOCK C. B.—The engraving of a mere ornamental border is not an offence within the statute; but whether the royal arms and the *Britannia* engraved on this plate purport to be part of a note of the company, was a question for the jury.

Bittleston. The picture is one of the marks by which the note is known.

CROWDER J. referred to *Rex v. Goldstein* (*c*) as to the meaning of the word “purport.”

POLLOCK C. B.—The conviction was right. Taking that portion of the section which is applicable to this case, it provides that if any person shall engrave any part of any promissory note, purporting to be part of the note of any company carrying on the business of bankers, without authority, he shall be guilty of felony.

In this case the prisoner had engraved the arms of *Scotland*, which appear in the centre of the ornamental border of a promissory note of the *British Linen Banking Company*, and the figure of *Britannia* which appears on the left hand side of a note of that company, and nothing more; but the arms and the *Britannia* are placed in the plate in the same position as that in which they would appear in a genuine note. It is said that the arms and the *Britannia* are not part

(*a*) 1 Den. Cr. Ca. 565.

(*b*) This is so; but in *Regina v. Faderman* no question arose upon

the indictment before the Court of Criminal Appeal.

(*c*) Russ. & R. 473.

1855. of the promissory note ; and, no doubt, if we are to take the word "note" as expressing merely the obligatory part of a note and the formal words creating an obligation, that which the prisoner has engraved, or has procured to be engraved, is no part of the note ; but I think that the word "note" is used in the statute in its popular sense ; and if it were an offence to tear a promissory note, I think that offence would be completed if a person was to tear off the ornamental border, or indeed blank paper, forming part of the note. The question then is, do the arms and *Britannia* engraved on the plate in this case purport to be part of a promissory note of the company ? I think they do. To constitute the offence, that which is engraved must be capable of being used as part of a note, and be such as on comparison with a genuine note would purport to be a part of it. Now, on comparing the plate engraved in this case by the prisoner with a genuine note of the company, the jury have decided that the engraving does purport to be part of a note of the company, and I think they have rightly so decided ; and no one looking at the plate and genuine note could have any doubt about it. The same section of the statute makes it an offence to engrave any words resembling a subscription to a promissory note. On an indictment for that offence the alleged subscription must be compared with a genuine one, in order to see if it resembles it ; and so here I think the jury properly compared that which was engraved by the prisoner with a note of the company, in order to ascertain whether it purported to be part of a genuine note.

PARKE B.—This conviction is good. The part of the note engraved need not, in order to satisfy the statute, be the obligatory part, which is in general very simple. If the construction of the word "pur-

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porting" contended for by the prisoner's Counsel were the correct construction, there would be very great difficulty in reaching an offender at all, and the object of the Legislature would be frustrated. That object was to prevent persons from engraving parts of such notes as are circulated by banking companies. The first question is, whether, to bring a case within the statute, the thing engraved must purport upon its face to be part of a genuine note ? The word "purport" does not necessarily mean "purport on its face ;" nor would any instrument purport on its face to be a bank note, except it contained the obligatory words, and if, in order to say what the part engraved purports to be, you are restricted to looking only to the face of that which is engraved, a person might engrave nearly the whole of a note without its purporting to be part of a note. It is enough if the indictment shews that what is engraved purports to be part of a note of some of the banking companies, and in order to ascertain what the purport is, you must compare the part engraved with the genuine note. There is a provision in the latter part of the section prohibiting the engraving any words resembling, or apparently intended to resemble, any subscription to a promissory note. In order to see whether the forged signature resembles a signature to a genuine note, it would be necessary to compare the forgery with the genuine signature ; and so, in order to ascertain whether an engraving purports to be part of a note you must compare it with a genuine note. If a single dot or line only were engraved, there might not be enough to induce one to believe that the engraving purported to be part of a note ; but here the royal arms of *Scotland* and the *Britannia* are found in the same position as that which they would occupy in a genuine note ; and there is such a portion

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COLERIDGE J.—I have at length, after some doubt, come to the conclusion that this conviction is good. The first question for consideration is, what is the meaning of the word “purport?” The second is, how are we to arrive at the conclusion that an engraving purports to be part of a particular note?

We must give the word “purporting” a larger meaning than it ordinarily bears, or in many cases the provisions of the statute would be ineffectual. I think that the word “note” in the statute is not limited to the parts of a promissory note in a strict legal sense, but includes all that is on the paper upon which the note is written, and that the engraving, in order to constitute an offence, must be such as would, to a person who is acquainted with the genuine note, purport to be part of it. Suppose that the whole note has been engraved. To see that the engraving purported to be a genuine note, I must have either in my own mind a previous knowledge of the genuine note, or I must, by having a genuine note before me, resort to extrinsic evidence in order to obtain that knowledge. How can you say what a thing purports to be without instituting a comparison? If that is so with regard to a whole note, why may not the same process be adopted as to part? Why may I not look at a genuine note and ascertain whether what is engraved purports to be part of it? That is all that was done in this case, and the jury, on instituting this comparison, were satisfied that the engraving did purport to be part of a genuine note. Here the thing imitated was in part an ornamental figure of *Britannia*, and I do not see why the imitation should not be compared with the original in the same way as you would compare the imitation of the figure of *Britannia*.

on the back of a counterfeit coin with the same figure on the back of a genuine coin, in order to ascertain whether an imitation was intended.

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CROMPTON J.—This being a highly penal statute, I also had at first considerable doubt, but I have arrived at the same opinion as the rest of the Court. The statute would be inoperative in many cases, unless we give a larger meaning to the word "purporting," than to say that it merely means appearing on the face of the engraving. I think the statute means that the engraving must purport to be part of a genuine note, to a person who is acquainted with the genuine note. I also think that the word "note" is used, not in the strict legal sense but in the popular sense, and includes the border and everything else which is upon the paper on which the note is written.

CROWDER J.—I have no doubt that the conviction was right, and that this case comes not only within the intention, but within the precise words of the statute. Extrinsic evidence was properly resorted to in order to ascertain whether the engraving resembled the genuine note, and indeed one cannot ascertain what a thing purports to be without having recourse to extrinsic evidence, and this applies equally whether the engraving purports to be part of a note or an entire note. By part of a note is meant any of those *indicia* appearing on a genuine note by which it is known; and it is quite clear that two of those *indicia* appear upon the plate which the prisoner caused to be engraved.

Conviction affirmed.

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REGINA v. THOMAS SMITH.

The prisoner was indicted for receiving a watch, knowing it to have been stolen. It appeared in evidence that the prosecutor, whilst in company at night with a prostitute at a public-house, where the prisoner and one

THE following case was reserved for the opinion of the Court of Criminal Appeal by Mr. *Edwin James Q. C.*, Recorder of *Brighton*.

At the Quarter Sessions of the Peace for the borough of *Brighton*, holden at the Town Hall in the said borough, before the Recorder of the borough, on the 8th day of *May*, 1855, the prisoner, *Thomas Smith*, was indicted for feloniously receiving a stolen watch, the property of *John Nelson*, knowing the

H. and several other persons were, had the watch in question taken from his person, and charged the prisoner with stealing it; but upon a partial search by a policeman, it was not found. The prosecutor and the girl soon after went to a room in another house, which room was rented by her of the prisoner. After they had been there together about an hour the prisoner came to them, and asked the prosecutor if he had not lost his watch and what he would give to have it back? The prosecutor said, "I would give a sovereign." The prisoner then said, that if the prosecutor would let the girl go with him he would get it back. The prisoner and the girl then went to a room in a house where the prisoner lived, in which room *H.* was. There was a table in the room, and, although there was no watch on the table when they entered the room, a watch was a few minutes afterwards seen on the table, which one of the witnesses said must have been placed there by *H.* The prisoner told the girl to take the watch and get the sovereign. She took it to her room to the prosecutor, and in a few minutes the prisoner and *H.* came to that room, and *H.* asked for the reward. The prosecutor gave *H.* half-a-crown; the prisoner and *H.* left without the prisoner saying anything or receiving anything. Before the trial *H.* absconded. The Recorder told the jury that, if they believed that when the prisoner went to the girl's room and spoke about the return of the watch, and took the girl with him to the house where the watch was given up, he knew that the watch was stolen; and, if they believed that the watch was then, with the cognizance of the prisoner, in the custody of a person over whom the prisoner had absolute control, so that it would be forthcoming if the prisoner ordered it, there was evidence to justify a conviction. The jury found a verdict of guilty; and, in answer to the Recorder, stated their belief that though the watch was in the hand or pocket of *H.*, it was in the absolute control of the prisoner.

- Held.* 1. That the direction to the jury was right.
- 2. That the conviction was right, and that there was ample evidence to support it.
- 3. That manual possession or touch is unnecessary in order to sustain such a conviction; but it is sufficient if there is a control by the receiver over the goods.
- 4. That a person having a joint possession with the thief may be convicted as a receiver.
- 5. That a conviction for receiving is good, although a conviction for stealing would have been supported by the same evidence if the jury had so found.

same to have been stolen. It was proved that *John Nelson*, the prosecutor, between eleven and twelve o'clock on the night of the 12th of April in this year, was in a public-house called the *Globe* in *Edward Street* in the said borough ; he was in company with a prostitute named *Charlotte Duncan*, who lodged in a room of a house No. 17, *Thomas Street, Brighton*, which belonged to the prisoner, of whom she rented the room.

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The prisoner and five or six other persons were present in the apartment in the *Globe Inn* when the prosecutor and *Charlotte Duncan* entered : while the prosecutor was drinking in the *Globe*, his watch, being the watch named in the indictment, was taken from his person by some one who forced open the ring which secured the watch to a guard. The prosecutor heard the click of the ring and immediately missed his watch, and taxed the prisoner as the thief. A policeman was sent for and a partial search made, but the watch was not found. The prisoner was present all that time, and also a man named *Hollands* was present all the time. Soon after the loss of the watch the prosecutor and the girl *Charlotte Duncan* went together to *Charlotte Duncan's* room in *Thomas Street*. After they had been there together little more than an hour the prisoner came into the room where they were, and said to the prosecutor, "Was not you in the *Globe*, and did not you lose your watch ?" The prosecutor said, "Yes." The prisoner then said, "What would you give to have your watch back again ?" Prosecutor said, "I'd give a sovereign." Prisoner then said, "Well, then, let the young woman come along with me, and I will get you the watch back again." *Charlotte Duncan* and the prisoner then went together to a house close by, in which the prisoner himself lived. They went

1855. together into a room in which *Hollands* was. This was nearly one o'clock. There was a table in the room ; on first going in *Charlotte Duncan* saw there was no watch on the table, but a few minutes afterwards she saw the watch there. The prisoner was close to the table. She did not see it placed there, but she stated it must have been placed there by *Hollands*, as, if the prisoner to whom she was talking had placed it there, she must have observed it. The prisoner told *Charlotte Duncan* to take the watch and go and get the sovereign. She took it to the room in 17, *Thomas Street*, to the prosecutor, and in a few minutes the prisoner and *Hollands* came to that room. *Hollands* asked for the reward. The prosecutor gave *Hollands* half-a-crown, and said he believed the watch was stolen, and told him to be off. *Hollands* and the prisoner then left. The prisoner did not then say anything, nor did the witnesses see him receive any money. *Hollands* absconded before the trial. The Recorder told the jury that, if they believed that when the prisoner went into the room 17, *Thomas Street*, and spoke to the prosecutor about the return of the watch, and took the girl *Duncan* with him to the house where the watch was given up, the prisoner knew that the watch was stolen; and, if the jury believed that the watch was then in the custody of a person with the cognizance of the prisoner, that person being one over whom the prisoner had absolute control, so that the watch would be forthcoming if the prisoner ordered it, there was ample evidence to justify them in convicting the prisoner for feloniously receiving the watch. The jury found the prisoner guilty, and, in answer to a question from the Recorder, stated that they believed that, though the watch was in *Hollands'* hand or pocket, it was in the prisoner's absolute control.

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Sentence was passed on the prisoner, but was res-
pited until the opinion of the Court could be taken.

The question for the opinion of the Court is, if the
conviction of the prisoner is proper?

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This case was argued on the 2nd day of *June* 1855,
before Lord CAMPBELL C. J., ALDERSON B., ERLE J.,
PLATT B. and CROWDER J.

No Counsel appeared for the Crown.

Creasy, for the prisoner. The direction under
which the verdict was returned was wrong in point of
law. First, there was no sufficient proof of possession
by the prisoner, and the Recorder was not justified in
leaving it to the jury to consider whether the watch
was in the prisoner's absolute control. Secondly, if
Hollands' possession is to be treated as the possession
of the prisoner, there is no proof that the watch was
stolen by any one. Thirdly, the evidence points
rather to a stealing than a receiving by the prisoner.
With respect to the possession of the watch by the
prisoner, it was clearly never in his manual posses-
sion, nor can it, upon the facts, be said, that it was
ever constructively in his possession. Assuming the
watch to have been stolen by some one, and that one
to be *Hollands*, it was throughout in the possession of
Hollands, and not in the possession of the prisoner ;
nor can it be said that a constructive possession arose
from any control which the prisoner could have over
Hollands, who was a man of full age. In *Regina v.*
Wiley (a) two thieves were seen to come at midnight
out of a house belonging to the prisoner's father.
One of the thieves carried a sack containing the stolen
goods, the other thief accompanied him, and the pri-
soner preceded them, carrying a lighted candle. All

(a) 2 Den. Cr. Ca. 37.

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three went into an adjoining stable belonging to the prisoner, and shut the door. Policemen entered the stable, and found the sack lying on the floor, tied at the mouth, and the three men standing round it as if they were bargaining, but no particular words were heard. In that case it was held by eight Judges to four, that on this evidence the prisoner could not be convicted of receiving stolen goods; inasmuch as, although there was evidence of a criminal intent to receive, and of a knowledge that the goods were stolen, yet the exclusive possession of them still remained in the thieves, and therefore the prisoner had no possession, either actual or constructive. So here, supposing the watch to have been stolen by *Hollands*, there was nothing to shew a receiving by the prisoner from *Hollands*, and the prisoner's statement merely shews that he thought he had the means of inducing the person who had stolen the watch to give it up. In *Regina v. Wiley*, *Patteson J.* says (a), "I do not think it necessary that in order to constitute a man a receiver he should touch the goods, or that, under certain circumstances, a party having a joint possession with the thieves, may not be convicted as a receiver; but I think, to make a person liable as a receiver, the goods must be under his control." *PARKE B.*, in his judgment in the same case, says, "It seems to me that there must be a distinction made between receiving the stolen goods and receiving the thief" (b).

(a) *Creasy* was quoting from the report 20 Law Jour. M. C. 5. In the judgment of *Patteson J.*, as given in 2 Den. Cr. Ca. 48, his Lordship is reported to have said: "I think the conviction wrong. I do not consider a manual possession or even a touch" essential to a receiving. But it seems to me that there must be a control over the

goods by the receiver which there was not here."

(b) The judgment of *PARKE B.*, as reported in 2 Den. Cr. Ca. 49, is as follows:—"We have only to consider the precise point submitted to us in the case reserved. The taking 'as above' was said, by the chairman, to amount to a receiving; that only incorporates so

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The finding of the jury in this case amounts to this, that the physical possession was in *Hollands*, and that there was no actual possession by the prisoner. Then, is there anything to shew a constructive possession by him? *Hollands* placed the watch on the table, but it remained in his personal possession all the time, and never was in the possession of the prisoner at all.

ALDERSON B.—Is there not evidence here of a joint possession by the thief and the prisoner? If you admit that, you are out of Court.

ERLE J.—Can you extract a definite principle on that very vaguest of all vague matters; what is the meaning of the word possession?

Creasy. The only way to do that is by an exhaustive process, shewing what is not a possession. Proving that a person is present with a corrupt purpose, when stolen property is lying about, is not a receiving. Here the prosecutor taxed the prisoner with the theft, and indeed, supposing there to be possession, and taking the finding of the jury that the watch was under the absolute control of the prisoner to be correct, the recent possession is proof of stealing and not of receiving. In 2 *Russ. on Crimes*, 247, it is laid down that upon an indictment for receiving

much of the transaction as relates to the taking of the goods into the stable. We must not, therefore, speculate on the question whether the three prisoners were all participating in the wrongful act, or what would be the legal consequences to each of their so doing. Receiving must mean a taking into possession actual or constructive, which I do not think there was here. The prisoner took the thieves into the stable; but he never accepted the goods in any sense of the word except upon a contingency, which, as it happened, did not arise. I

think the possession of the receiver must be distinct from that of the thief; and that the mere receiving a thief with stolen goods in his possession would not alone constitute a man a receiver." On the question of joint possession, COLERIDGE J. in the same case remarks, "That in that case joint possession is excluded by the common intention;" and ALDERSON B. says, "I think that there may be a joint possession of goods in a thief and a receiver; but there was no evidence of that here."

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stolen goods, there should be some evidence to shew that the goods were in fact stolen by some other person, and recent possession of the stolen property is not alone sufficient to support such an indictment, as such possession is evidence of stealing and not of receiving ; and for this the decision of *Patteson* J., in *Rex v. Densley* (a) is cited ; and in *Rex v. Sarah Cordy* (b) *Littledale* J. says, “In a case on the early part of the circuit, the only evidence was recent possession, and the Counsel for the prosecution urged that that was evidence of receiving, but I held that it was not. I hold it essential to prove that the property was in the possession of some one else before it came to the prisoner.”

Then does not all the evidence in this case point to a theft by the prisoner, and not a receiving by him after the theft was committed by some other person ? There is no evidence of receiving unless you take the evidence which is said to shew possession, and that points to a stealing and not to a receiving.

Lord CAMPBELL C. J.—I think that the conviction was right. In the first place the direction of the learned Recorder was unexceptionable. According to the decided cases as well as to the dicta of learned Judges, manual possession is unnecessary. If we were to hold a contrary doctrine, many receivers must escape with impunity. Then it has been held in decided cases, including *Regina v. Wiley* (c), that there may be a joint possession in the receiver and the thief; that is the *ratio decidendi* on which the judgment in that case proceeds. Then, was not there ample evidence to justify the jury in coming to the conclusion at which they arrived ? I think there was. They might, it is true, have drawn a

(a) 6 Car. & P. 399.

cited 2 Russ. on Cr. 248.

(b) Gloucester Lent Ass. 1832,

(c) 2 Den. Cr. Ca. 37.

different conclusion, and have found that *Smith* was the thief; and if they had drawn that conclusion, he would have been entitled to an acquittal. Another inference which they might have drawn, and which would also have resulted in a verdict of not guilty, was, that *Holland*, being the thief, the watch remained in his exclusive possession, and that the prisoner acted as his agent in restoring the watch to the prosecutor; but the jury have come to a different conclusion, and I think they were justified in so doing. We have instances in real life, and we find it represented in novels and dramas drawn from real life, that persons are employed to commit larcenies, and so deal with the stolen goods that they may be under the control of the employer. In this case *Hollands* may have been so employed by the prisoner, and the watch may have been under the prisoner's control, and if so, there was evidence of a possession both by *Hollands* and the prisoner.

ALDERSON B.—There was abundant evidence from which the jury might come to the conclusion at which they arrived, although there was evidence the other way.

ERLE J.—The doubt in these cases has arisen as to the meaning of the word “receive,” which has been supposed to mean manual possession by the receiver. In *Regina v. Wiley*, Patteson J. says, that a manual possession, or even a touch, is not essential to a receiving, but that there must be a control over the goods by the receiver. Here the question of control was left to the jury, and they expressly found, that though the watch was in *Hollands'* hand or pocket, it was in the prisoner's absolute control.

PLATT B.—There was some evidence that the prisoner might have been the thief, and the prosecutor charged him with being the thief; but a search was

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made and the watch was not found, and it was proved that *Hollands* absconded before the trial; from that and the other facts of the case, the jury might well find that *Hollands* was the thief and the prisoner the receiver.

CROWDER J.—I also think that both the direction and the conviction were right. There was sufficient evidence that *Hollands* was the thief. The question is then put to the jury, was the watch under the control of the prisoner? And they say it was. That finding is sufficient to support their verdict, and the conviction was right.

Conviction affirmed.

1855.

REGINA v. THOMAS PRATT.

The defendant was convicted, under the 1 & 2 Wm. 4, c. 32, s. 30, of trespassing on land in the possession and occupation of G. B. in pursuit of game. Held, that the entry upon the land under that section must be a personal entry; but it

THIS was a special case stated for the opinion of the Court of Queen's Bench, under sect. 11 of the 12 & 13 Vict. c. 45. The defendant had appealed against a conviction under 1 & 2 Wm. 4, c. 32, s. 30, by which an offence is committed (a), “if any person what-

(a) This case is reported, because the words of this section are somewhat similar to those of the 9th section of the Night Poaching Act, 9 Geo. 4, c. 69, which constitutes it a transportable misdemeanor “if any persons to the number of

three or more together shall by night unlawfully enter or be in any land, whether open or enclosed, for the purpose of taking or destroying game or rabbits, any of such persons being armed,” &c.

having been proved that the defendant was on the highway in pursuit of game and not as a traveller, and that G. B. was the owner of the land on both sides of the highway. Held, that as the soil and freehold of the highway was in G. B. as the owner of the adjoining land, there was a personal entry on the land by the defendant within the meaning of the statute. Quæry, (see note (a)), whether this decision applies to sect. 9 of the Night Poaching Act, 9 Geo. 4, c. 69?

soever shall commit any trespass by entering or being in the day time upon any land in search or pursuit of game." The Court of Quarter Sessions, on hearing the appeal, deferred their decision in order that a case might be stated for the opinion of the Court of Queen's Bench.

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The offence set out in the conviction was, that the defendant did, on the 11th of *October*, 1854, unlawfully commit a certain trespass, by being in the daytime on certain land in the possession and occupation of one *George Bowyer*, then and there in search of game. On the appeal it was proved that the defendant was on the day in question on a public highway with a dog and carrying a gun; that on the defendant waving his hand the dog entered into a plantation on one side of the highway in the possession and occupation of the said *George Bowyer*; that a pheasant rose and flew across the road, and the defendant, being still on the highway, fired at the pheasant, but did not kill it; that the said *George Bowyer* was the owner of the land on both sides of the highway, and was the lord of the manor; that the land was let to a tenant on one side, but the right of shooting was reserved; but the said plantation was in the actual occupation of the said *George Bowyer*.

This case was argued on the 21st of *April* 1855, before Lord CAMPBELL C. J., WIGHTMAN J., ERLE J. and CROMPTON J.

Carrington and *Lawrence*, in support of the conviction, cited *Pickering v. Rudd* (*a*); *Hill v. Walker* (*b*); *Dimmock v. Allenby* (*c*); *Dovaston v. Payne* (*d*);

(*a*) 4 Campb. 219.

2 Marshall, 582.

(*b*) 2 Peake's Addit. Ca. 234.(*d*) 2 H. B. 528.(*c*) Cited in *Deane v. Clayton*,

1855. *Goodtitle v. Alker* (*a*) ; *Rex v. Whittaker* (*b*) ; *R. v. Mellor* (*c*).

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Dowdeswell, on the other side, cited *Rex v. Nickless* (*d*) ; *Fletcher v. Calthrop* (*e*), and the note as to constructive entry, 1 *Greaves Russ. on Crimes*, 476.

Lord CAMPBELL C. J.—(After stating the facts and the questions for the consideration of the Court). I think the mere sending the dog into the plantation would not be sufficient to support the conviction, because, in my opinion, the offence contemplated by the Legislature was, that the offender should personally enter, or be upon the land upon which the trespass is charged to have been committed; but the justices were warranted in convicting the defendant of the offence charged, for the defendant was bodily upon the land which was the property of Mr. *Bowyer*, and he was there in pursuit of game. The soil and freehold of a highway remain in the owner of the adjoining land, although the public have an easement over it—a right to use it as a highway, but the grass which grows upon it is his, and, subject only to the easement, the property is exclusively his. Then the soil and freehold of the land in this case were in Mr. *Bowyer*, and for the purposes of this statute it must be considered as in his possession and occupation. It is shewn by the evidence that the defendant was upon this highway, not as a traveller and for the purpose of exercising a right of passage along it, but solely for the purpose of searching for game; and he was therefore properly convicted.

The other learned Judges concurred.

Conviction affirmed.

(*a*) 1 Bur. 133.

(*d*) 6 Q. B. Rep. 880.

(*b*) 1 Den. Cr. Ca. 310.

(*e*) 8 C. & P. 757.

(*c*) 2 Dowl. P. C. 173.

REGINA *v.* JAMES HOLDER ALLEYNE,
ALEXANDER M'GEACHY ALLEYNE AND
THOMAS DOPPING BUCHANAN D'ARCY.

1854.

ALLEYNE AND OTHERS *v.* REGINA (IN
ERROR) (a).

IN the first mentioned case in *Easter Term 1854*, *Edwin James* obtained a rule calling on the defendants to shew cause why (*inter alia*) a writ of error, which had been brought upon a bill of exceptions which had been tendered at the trial of the defendants for conspiracy, should not be quashed, on the ground of the same having been sued out with a view to a compromise of this prosecution, and for the purpose of enabling such compromise to be effected.

The case was argued on the 3rd, 9th and 10th of November 1854; *Shee*, Serjt., *S. Temple* and *Huddleston* shewing cause, and *Edwin James* and *Hawkins* supporting the rule. The facts are sufficiently shewn by the judgment.

Lord CAMPBELL C. J.—This is a rule calling upon us to order that a writ of error may be quashed, on the ground that the same was sued out with the view of compromising a prosecution, and for the purpose of enabling the persons suing it out to effectuate that compromise; and I am of opinion that the rule must be made absolute. We have clearly jurisdiction to grant

(a) I am indebted for this report to Mr. W. S. Cross. The report of the judgment in the Queen's Bench

was delayed, as it was expected that the case would be taken to the Court of Exchequer Chamber.—H. R. D.

Where a writ of error is sued out upon a judgment of the Court of Queen's Bench in a criminal prosecution, for the purpose of enabling the parties to effect a compromise of such prosecution, that Court has the power under the 12 & 13 Vict. c. 109, s. 39, to set aside such writ of error, and will exercise that power; and after the writ of error has been so set aside by a Court of competent jurisdiction, the Court of Exchequer Chamber will set aside a judgment, signed thereon by order of a Judge, for want of a joinder in error.

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such a rule. At common law the power of dealing with a writ of error on a judgment which had been pronounced was in Chancery, in the Petty Bag Office, on the common law side of that Court ; but by the 12 & 13 Vict. c. 109, s. 39, that jurisdiction was transferred to the superior Courts of common law in *Westminster Hall* ; and in the case of *Garrod v. Tuck* (*a*), it was decided by the Court of Exchequer Chamber that that Court had no such power ; and that the application should be made to the Court in which the original proceeding was had, and from which the judgment alleged to be erroneous came. Well, then, we have the jurisdiction to say what ought to be done ; and the question is, what we shall in this case direct, if we think it true, as alleged in the affidavits in support of this application, that the writ of error was sued out with a view to a compromise, and for the purpose of effecting that compromise. The issuing out of a writ of error under such circumstances is a gross abuse of the process of the Court ; for the writ is not then sued out in furtherance of justice, but in order that justice may be defeated. It seems to me most clearly made out, that that was the object in this case. The three defendants, the two *Alleynes* and *D'Arcy*, were indicted for a conspiracy to defraud *Kennedy* of money by false pretences. The trial came on before me, and after a most careful investigation they were convicted ; and I must say that they were convicted to my entire satisfaction ; and I believe I may add, to the satisfaction of all who heard the trial. The bet as to which the fraudulent pretences were employed, had been made by *James Holder Alleyne*, and he misrepresented the name and the then condition of the horse on the performances of which the bet was to

(*a*) 8 Com. Bench, 231, 258.

depend: it was clearly proved that after the bet was made, and before the day when the match was to be trotted, the mare became unwell and was unable to go. That fact was perfectly well known to the defendants, and the contrivance was then resorted to of alarming *Kennedy* and making him believe that the mare was sure to be successful, and that he (*Kennedy*) had not the most distant chance of winning any one of the numerous bets in which he had engaged; and it was, therefore, suggested to him that he had better pay the whole. He agreed to do so; but it was with the understanding that he was to receive some compensation for his losses, for he was to make the payment with the imaginary benefit that was to arise to him from becoming a shareholder in the mare, and in her future winnings. The jury were perfectly satisfied as to the guilt of the three defendants, and found them all guilty. In the discharge of my duty, making observations at the moment from which I do not now in the least degree shrink, I sentenced *Holder Alleyne* to two years' imprisonment, *D'Arcy* to one years' imprisonment, and *M'Geachy Alleyne* to six months' imprisonment, making a difference in their punishment according to what I believed to be the difference in the degree of their guilt. I called on them to appear in Court and receive the sentence of the law. They fled, that justice might be defeated. I issued a warrant for their apprehension, but they were not apprehended. Soon after that they effected a compromise with the prosecutor who received a sum of 5300*l.* It has now been proved to my entire satisfaction that part of the terms on which that money was paid was, that the judgment of this Court should be defeated by the means of allowing the writ of error to proceed to judgment without opposition. The defendants had it in their power if they thought the facts justified it, and that

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1854. the verdict could not be supported, to move for a new trial. The pretence that they believed they could not do so except when all the defendants were present in Court, was merely illusory. Any one of the defendants who thought fit to appear, might have moved for a new trial, but no such motion could be made in the absence of all the defendants, and when they had fled from justice. No application for a new trial was made, so that, for anything that appeared to the contrary, they ought to have suffered the punishment which the law had awarded. But they had escaped from the country in order to avoid the punishment, and they took further means to defeat the law. By what means were they able to do so? By suing out a fraudulent writ of error, and fraudulently getting judgment on it in their favour. It is clearly established by the affidavits, and by facts which do not admit of any doubt, that the consideration for the money which was paid on the 16th of *January* was, that *Kennedy*, the prosecutor and *Newton* the attorney, should no further prosecute the indictment, but that the prosecution should become abortive. The facts speak for themselves, for it is clear that the sum would never have been paid by the *Alleynes* to *Kennedy*, unless on the well understood arrangement that there should be an end of the prosecution.

There had been at an early time attempts made to compromise the indictment. For some reasons which influenced the parties at that time, no such arrangement was made. That which took place afterwards clearly embraced the indictment on which these defendants had been convicted. It is unnecessary for me to say anything of the second indictment, but nothing in the observations made upon that indictment at all induces me to doubt that part of the consideration for the compromise, and the payment

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of the sum of money was, that the first indictment should not be further pursued against these defendants. When that second indictment was brought before us, it seemed to me to remove all possibility of doubt; for in that second indictment which was to be supported by the oath of *McGeachy Alleyne*, there is a positive charge that the money was received for compromising the indictment. The allegation now made in support of this application is therefore itself supported by the *Alleynes*. I do not believe that with respect to the application for a new trial, the distinguished member of the profession (now no more) (a), under whose advice the *Alleynes* then acted, ever gave the advice which it is now asserted he gave. No valid objection is suggested against such an application. A bill of exceptions could not lie for the statute of *Westminster* 2 is confined to civil causes. But a rule for a new trial might have been applied for. The whole object of these defendants then was to obtain a compromise. They paid the money for that purpose. They paid it on the 16th of *January*, and it was not until the 28th of *February* that they brought a writ of error. What was the object of that writ of error? It was to defeat the course of justice. We are bound when, from any cause, such attempts to defeat the course of justice are brought before us, to do our best to prevent their success. The administration of the law is placed in our hands under the charge to do so. Justice is no doubt frequently perverted by corrupt compromises between prosecutors and defendants, but when a case of that kind is brought to our knowledge, we shall take care to prevent the compromise having any effect. Here we have abundant means of seeing how that abuse was attempted, and we are bound immediately

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(a) Alluding to the late Mr. *Humphrey Q. C.*

1854. to take steps that justice may no longer be delayed.
This rule must be made absolute.

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COLERIDGE J.—I am of the same opinion to the same extent, and on the same grounds as my Lord; and under ordinary circumstances I should not feel it necessary to add one word to the remarks he has made. It is impossible for a Court of justice to look closely into the motives of parties, and when such proceedings as these arise they must be examined without reference to motives: good and bad men indifferently bring cases before us—the good man may be wrong, the bad man may be in the right in the particular case—and the judgment of the Court must be given, not with reference to the individual, but with reference to the case; but there is one principle especially familiar to us all, that every Court of justice is bound to take care that its process shall not be abused for purposes of injustice, nor its authority deliberately perverted to bad and wicked ends. In this case I have no doubt that we have the jurisdiction to deal with the writ of error—it is part of our own proceedings, and we may deal with it as if it issued from this Court. It is now stated that this writ of error was brought for the purpose of a corrupt compromise, and if that statement is well founded, then the writ of error ought not to be allowed to stand, but the judgment against which it was directed ought to be restored. Is that allegation proved in this case? I think that it is as clearly as anything can be proved, which has not actually passed under the eyes of him who gives an opinion upon it. There has been from the first a tendency to listen to schemes of compromise, but while the result of the trial was in doubt, the defendants would not accede to the offers which were suggested. I found my opinion on the notes of the trial, because I did not hear it in person, and on those

notes I say that the trial was followed most justly to a conviction. Of course after that conviction the claims of the prosecutor mounted up, and the motives on the other side to accede to a compromise were equally increased. One side desired to retain the money, the other to get it back again. A bill in Chancery was filed, and the defendants fled the country, and so gained a little time for consideration. A consultation of counsel was held, but the counsel little knew on what slight matter they were consulting, for an agreement had been made between the parties, and money was paid and received—of course ostensibly for the arrangement of the civil proceeding; but when the course of moving for a new trial was abandoned, it must be obvious to all that the new trial had become of little importance, for the whole proceeding had been settled by private arrangement. It so happened that in the course of the trial a bill of exceptions had been tendered. It was supposed that on argument a *venire de novo* might be awarded, but it was deemed desirable that the matter should pass *sub silentio*. The compromise was therefore made, the writ of error was issued, no argument took place, and the original judgment was quashed. This was the real sense and substance of the whole transaction. Is it to be believed that a sum of 5300*l.* would have been paid to stop a civil proceeding, such as was instituted here, if there had not been the least apprehension that the criminal proceeding might be carried to its full end, and that a *bona fide* new trial must have taken place, or the defendants must have suffered the punishment awarded against them? To my mind the conversation reported by the short-hand writer is the most transparent part of the fraud, and confirms me in the opinion as to the criminal nature of the compromise with which we have now to deal. It

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1854. would be highly improper if, under such circumstances, the Court did not vindicate the integrity of its own proceedings, and it can only do so in this instance by making the rule absolute.
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WIGHTMAN J. and ERLE J. concurred.

Rule absolute for quashing the writ.

1855. After the above decision of the Court of Queen's Bench, namely on the 6th of *February* 1855, a second writ of error was sued out at the instance of *J. H. Alleyne* and *A. M. Alleyne* (the defendant *D'Arcy* being dead), and on the 26th of *April* 1855 an assignment of errors upon this second writ of error was delivered to the attorney for the prosecution, and a demand made of joinder in error, or a plea to the assignment. It was assigned as the chief ground of error, that the original judgment of the Court of Queen's Bench had been reversed on error by the Court of Exchequer Chamber before the decision of the Court of Queen's Bench in the last case. The prosecutor obtained six weeks time to join in error, and on the 26th of *May* 1855, *Welsby* obtained in the Court of Exchequer Chamber a rule calling on the plaintiffs in error to shew cause why the roll and record, and all other proceedings, should not be amended by striking out the entry of the judgment of the Court of Exchequer Chamber, an order of Mr. Baron *MARTIN*, and a rule of Court founded thereon authorizing such entry, on the ground that the original writ of error upon which such judgment was founded had been set aside by the Court of Queen's Bench.

It appeared from the affidavit upon which the application was made, that the first writ of error was sued out on the 28th of *February* 1852, and that an order was made by Mr. Baron MARTIN on the 29th of *June* 1852, ordering judgment to be signed upon this writ of error for want of a joinder in error by the defendants in error, and on the 28th of *August* 1852, a rule of this Court was drawn up on reading the said order authorizing such judgment to be signed, and an entry of these proceedings was accordingly made on the roll, and the transcript filed in this Court.

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On the 16th of June 1854, the rule came on for argument before PARKE B., ALDERSON B., MAULE J., CRESSWELL J., PLATT B., WILLIAMS J., MARTIN B. and CROWDER J.

Bramwell and *Willes* shewed cause, and contended that the record contained a true narrative of the facts as they occurred, and that they ought to be allowed to remain on the record. They cited *King v. Simmonds* (a). They also contended that the application was wrong in point of form, in not seeking to set aside the writ of error; for this they cited *Brooks v. Roberts* (b).

Welsby and *Hawkins*, contra. The Court is asked to strike out that which alone it has power to deal with, namely its own judgment, which was a nullity and not an irregularity, inasmuch as the writ of error upon which that judgment was founded had been set aside by the Court of Queen's Bench. They cited *Garrard v. Tuck* (c).

PARKE B.—We are all of opinion that this rule must be made absolute. It appears that the writ of error, which is a commission to us to examine the

(a) 1 House of Lords Ca. 754.

(b) 1 Com. Bench, 636.

(c) 8 Com. Bench, 254.

1855. record, was improperly issued, and that commission, which, under the statute, gives to us or to a single Judge a jurisdiction which was formerly exercised by the Court of Chancery, is void. It has been contended that this motion is irregular because it seeks to set aside a judgment without setting aside the writ of error on which the judgment was founded; but the cases cited in support of that proposition apply only to proceedings which are irregular, and not to such as are entirely void, and no case has been cited to shew that, where there is an execution on an irregular judgment, such execution cannot be set aside without also setting aside the irregular judgment upon which it is founded. Although the record does contain a true narrative of the facts, it must not be crammed with matters which ought never to have been there.

Rule absolute.

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of the County of Norfolk*

REGINA v. JOHN EAGLETON.

1854-55.

THIS was a case reserved for the opinion of the Court of Criminal Appeal by the Recorder of *Great Yarmouth*. The case, as originally stated, together with the indictment and the documents referred to in

The defendant contracted in writing with the guardians of a parish to supply and deliver for a certain term to the out-door poor, at such times as the guardians should direct, loaves of bread of three and a half pounds weight each. The guardians were, during the said term, to pay the defendant after certain rates and prices for the bread so supplied, and of which a bill of particulars should have been sent. The contract contained a proviso, that in case the defendant broke the terms of his contract in any of the ways therein named, one of which was by a deficiency in the weight stated and charged for in the said bill of particulars, the guardians might employ other persons to supply the bread, and charge the defendant with the costs of such supply above the price contracted for, and might retain any moneys due to the defendant under the contract at the time of such breach towards such costs, or the damages which the board might sustain, and might also put in suit against the defendant a bond which he then executed, and which was conditioned for the due performance of his contract.

The indictment contained ten counts, the first seven of which were in substance the same, and charged the defendant with a common law misdemeanour, in supplying and delivering, as such contractor, loaves of bread to different poor persons, which loaves were deficient in weight, intending to injure and defraud such poor persons and to deprive them of proper and sufficient food and sustenance, and to endanger their healths and constitutions, and to cheat and defraud the said guardians.

The three last counts charged the defendant with attempting to obtain money from the guardians by falsely pretending to the relieving officer that he had delivered loaves of the proper weight.

It was proved in evidence, that on a poor person applying for relief the relieving officer gave the applicant a ticket, the presentation of which to the defendant entitled him to receive a loaf; that the defendant received these tickets and gave to the poor persons presenting them loaves of bread which the jury found were deficient in weight, and were so with the knowledge of the defendant.

By the course of dealing the defendant would return the tickets in the following week, with a statement in writing of the number of loaves he had supplied, and the relieving officer would credit the defendant in account with the guardians with the amount, and the money would then be paid to him at the time stipulated in the contract. The tickets were so returned by the defendant, and he was credited in account accordingly; but the fraud was discovered before the stipulated time for payment of the money had arrived. The jury found that the defendant intended to defraud the out-door poor, and that by returning the tickets to the relieving officer he intended to represent that he had delivered the loaves mentioned in them of the weights stated.

Held. 1. That the first seven counts did not disclose an indictable offence, as the delivery of loaves of less weight than that contracted for was a mere private fraud, no false weights or tokens having been used. 2. That the defendant was properly convicted on the last three counts of attempting to obtain money by false pretences, as the fraudulent representation made was of an antecedent fact; and that although the defendant had only obtained credit in account, and could not have been convicted of obtaining money by false pretences, he was nevertheless properly convicted of the attempt, his obtaining the credit in account being the last act depending on himself towards obtaining the money.

Quære, whether a sale of goods with a false representation of the weight or quality is an indictable offence?

EAGLETON'S Case. 1854-55. the case, are fully set out, *ante*, p. 376. The Court, at a sitting holden on the 28th day of *April*, 1854, having considered that the case should be amended so as to disclose the evidence on which the jury found the verdict of guilty on the last three counts of the indictment, the learned Recorder subsequently stated the same to be as set out, *ante*, p. 390. The case, as amended, came on to be argued on 3rd *June*, 1854, and the arguments on that occasion will be found *ante*, p. 393. Before the conclusion of the arguments on behalf of the defendant it was intimated by the Court that the case was of such importance to the administration of justice that the Court had come to the conclusion that it had better be adjourned till the *Michaelmas* Term following, which was accordingly done.

It was stated in the course of the argument on behalf of the defendant on 3rd *June*, 1854, that in the first edition of *Chitt. Crim. Law* there was a precedent (*a*) of an indictment against a baker at *Norwich* charging an offence similar to that disclosed by the first seven counts of the present indictment; but that in the second edition of Mr. *Chitty's* work that precedent was omitted, it being stated that the facts charged had been held not to constitute an indictable offence.

It was intimated by the Court that it was desirable that a report of any case in which it was so held should be found.

Search having accordingly been made an entry was found in the *Norfolk Circuit Gaol Delivery Minute Book* as to an indictment at the city of *Norwich*, Summer Assizes 25th *July*, 55 *Geo. 3*, against one

(*a*) The precedent referred to will be found in 2 *Chitt. Crim. Law*, 1st edit. p. 559, and in a note (*g*) it is said, that the indictment was settled on the decided opinion of a very experienced barrister, that

the offence was indictable on the ground stated 2 *East P. C.* 821, that all frauds affecting the public at large are indictable, though arising out of a particular transaction and contract.

Benjamin Harling, on which indictment a verdict of 1854-55.
not guilty had been returned. The following is a copy EAGLETON'S
of the abstract or minute of the indictment as entered Case.
in the said minute book, and was certified to be a true
extract therefrom by the deputy clerk of assize of
the *Norfolk* circuit.

"That defendant on the 29th *September*, 1812,
contracted with the governor, &c., of the poor of
Norwich to make and deliver until 29th *September*
following, bread of seconds flour to be delivered the
day after the same was baked, each to weigh 1lb. 15oz.,
at a certain price, but contriving to cheat the poor and
deprive them of a portion of their daily allowance, on
15th *July*, 1813, delivered to *Stannard* the master and
superintendent of the poor, 120 loaves not weighing,
1 lb. 15 oz., but 1 lb. 11 oz.

"2nd. The like without specifying the exact weight,
but that the loaves were less weight than contracted for.

"3rd. Like the first, without stating with whom the
contract was made, but generally that the defendant
contracted to make and deliver the bread to weigh
1lb. 15oz., and that each loaf weighed only 1lb. 11oz.

"4th. That defendant, for a reasonable reward,
contracted with the governor, &c., to deliver loaves
weighing each 1 lb. 15 oz., and that he delivered 120
loaves of a much less weight knowing them to be
deficient."

Search was made by the clerk of assize for the
Norfolk circuit for the indictment itself, but it could
not be found; nor does it appear from the above
extract under what circumstances the verdict of not
guilty was returned; but the learned Recorder, by
whom this case was reserved, furnished the following
report of the case of *Rex v. Harling* from the *Norwich*
Mercury of July 29th, 1815, which newspaper he
found in the *British Museum*.

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"*The King v. Harling.* This was an indictment instituted by the court of guardians in this city against the defendant for supplying the workhouse with bread short of weight, with intent thereby to defraud the poor in the house of a portion of their allowance. The contract into which the defendant had entered with the corporation (in consequence of a public advertisement appearing in the *Norwich Mercury*) to provide bread for the workhouse, each loaf to weigh 1lb. and 15oz., was proved. The mayor, who was one of the committee, was examined, and stated that he weighed one of the loaves sent by the defendant, on the 16th *July*, 1813, and it weighed only 1lb. and 11oz.; he then weighed a score of loaves, and found a deficiency of 4lbs. in weight; after that he weighed six score, and there was a deficiency of 25½lbs.; but an objection was taken on the part of the defendant that the offence with which he was charged was not an indictable offence as, in order to constitute such an offence, it was necessary that the public should be injured by it; and further, that it must be such as ordinary prudence could not provide against. It was also urged that sending a less quantity than was contracted for, is merely a breach of a civil contract and not an indictable offence. It was answered on the other side that it was an indictable offence, inasmuch as all the poor in the workhouse were affected by it, and inasmuch as the contract was not made with a private individual (a breach of which would have made only a private injury), but with a body of persons incorporated which made it public. The Court was of opinion that according to strict law, it was not an indictable offence, but only a breach of a civil contract, and therefore that the indictment could not be supported. The jury were directed to acquit the defendant, who was very severely reprimanded by the Judge."

This case appeared to have been tried before 1854-55. *Thompson C. B.*, or Sir *Vicary Gibbs C. J.*, but it ^{EAGLETON'S Case.} was uncertain which.

This case was again argued on the 2nd *December*, 1854, before *JERVIS C. J.*, *POLLOCK C. B.*, *PARKE B.*, *MAULE J.*, *WIGHTMAN J.*, *ERLE J.*, *PLATT B.*, *MARTIN B.*, and *CROMPTON J.*.

Bulwer appeared for the Crown, and *Clerk, J. Burchell and Poland* for the defendant.

Clerk (J. Burchell and Poland with him) for the defendant. The first seven counts are for a cheat at common law, and the three last counts for attempting to obtain money by false pretences.

PARKE B.—I suppose the seven first counts were disposed of at the first hearing.

Bulwer. Some of the Judges thought those counts good.

Clerk. Probably those counts would never have appeared, had it not been that in the first edition of *Chitty's Criminal Pleading*, vol. 2, p. 559, a form of indictment is given on which those counts are founded, to which form is appended a note stating that the indictment was settled on the decided opinion of a very experienced barrister that the offence was indictable on the ground stated, 2 *East P. C.* 821, that all frauds affecting the public at large are indictable, though arising out of a particular transaction and contract. But in the second edition of the same work we find that this form is omitted.

Since this case was last argued, inquiries have been made as to the authority on which this form of indictment was so omitted.

The learned Counsel then referred to the extracts from the *Norfolk Circuit Gaol Delivery Minute Book* and from the *Norwich Mercury* newspaper, set out

1854-55. *ante*, pp. 517, 518, which he contended shewed that such an indictment was bad at common law, and disclosed only a fraud of a private nature.

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One of the leading cases on this subject, and, indeed, the case which is said to have clearly established the true boundary between those frauds that are and those that are not indictable at common law (*a*), is the case of *Rex v. Wheatley* (*b*). There the defendant, a brewer, was charged by an indictment at common law for that he, intending to deceive and defraud one *Richard Webb* of his money, falsely, fraudulently, and deceitfully sold and delivered to him sixteen gallons of amber for and as eighteen gallons, knowing there were only sixteen gallons. This was holden to be a civil injury only, and not an indictable offence, as it was a case of mere private imposition upon the person with whom the defendant was dealing, and he had not employed any false weight or measures, nor used any false tokens, nor conspired with any one else to cheat the prosecutor. In giving judgment, Lord *Mansfield* refers to a case of *Rex v. Wilders* (*c*). The prisoner, in that case, was a brewer, and was indicted for a cheat in sending in to Mr. *Hicks*, an alehouse-keeper, so many vessels of ale marked as containing such a measure, and writing a letter to Mr. *Hicks* assuring him that they did contain that measure, when in fact they did not contain such

(*a*) 2 Greaves Russ. on Crimes and Misd. 284.

(*b*) 2 Burr. 1125; 1 W. Bl. 273.

(*c*) See 2 Burr. 1128. Lord *Mansfield*, in referring to this case, states that he was informed of it by *Denison J.*, and that it was *M. 6 G. 1, B. R.*, and the learned reporter adds the following note: "I have a like account of this case. The Court said that the prosecutor

could not have been imposed upon without his own carelessness; and instanced the case of selling an unsound horse affirming him to be sound; and they held that such private unfair dealings which did not affect the public were not indictable crimes unless accompanied by false tokens or conspiracy, or selling by false weights or measures."

measure, but much less. This indictment was quashed 1854-55. on argument although, as Lord *Mansfield* remarked, it disclosed a stronger case than *Rex v. Wheatley*. EAGLETON'S Case.

In 2 *East P. C.*, a number of cases are collected, which all go to show that this is no offence at common law: *Rex v. Dunnage* (a), *Rex v. Haynes* (b), *Rex v. Lara* (c), *Rex v. Pinkney* (d), *Rex v. Bower* (e), *Rex v. Cornbrune* (g), *Rex v. Osborn* (h).

Clerk was then desired by the Court to direct his arguments to the last three counts; but as the whole of his arguments on the part of the defendant, as well as those of *Bulwer* on behalf of the Crown, as to those counts, were recapitulated on the subsequent hearing of the case, they are here omitted.

The argument was resumed on the 3rd day of February, 1855, before JERVIS C. J., PARKE B., MAULE J., WIGHTMAN J., CRESSWELL J., ERLE J., PLATT B., WILLIAMS J., and CROMPTON J.

Bulwer proceeded with his argument on behalf of the Crown as to the last three counts, and recapitulated his former arguments as to those counts.

The main question is, whether a man representing falsely, with intent to defraud, that he has completed a contract into which he has previously entered, is guilty of an indictable false pretence. There are three classes of cases in which money may be obtained by false pretences. First, the ordinary case where there is no contract; secondly, where the false pretence induces a contract, in pursuance of which the money is paid; and, thirdly, where the contract is bona fide in the first instance, there is then a false pretence that it has been performed.

(a) 2 Burr. 1130.

(b) 4 M. & S. 214.

(c) 2 East P. C. 819; 6 T. R. 565.

(d) 2 East P. C. 819.

(e) Cowp. 323.

(g) 1 Wils. 301.

(h) 3 Burr. 1697.

1854-55. All three classes are, I contend, within the statute
 EAGLETON'S Case. 7 & 8 Geo. 4, c. 29, s. 53, where the pretence is made with intent to defraud and money is obtained by it; and when it has been proved that a false pretence of an existing fact has been made, it is a question for the jury whether such pretence was made with intent to defraud, and whether the money was obtained by means of the pretence.

With regard to the second class of cases they are within the statute, and the fact of the pretence inducing a contract makes no difference. This is established by the decisions in *Reg. v. Kenrick* (*a*) and *Reg. v. Abbott* (*b*), and those decisions are in accordance with the general principle, that if the false pretence creates the credit it is within the statute.

As to the third class of cases, it is included in the generality of the term "false pretences," in the statute. In *Young and others v. The King in error* (*c*), Lord Kenyon C. J. says, that when the statute was passed it was considered to extend to every case where the party had obtained money by falsely representing himself to be in a situation in which he was not, or any occurrence that had not happened, to which persons of ordinary caution might give credit.

In *Witchell's case* (*d*) the prisoner obtained money by the false pretence, that certain workmen, whom it was his duty to pay, had earned more money than they really had, and that was held to be obtaining money by a false pretence within the statute; and this decision was on the principle, that if the false pretence creates the credit, it is within the statute. In *Rex v. Airey* (*e*), where a common carrier, having received certain goods for the purpose of carrying and deliver-

(*a*) 5 Queen's Bench Rep. 49.

(*b*) 2 Den. C. C. 273.

(*c*) 3 Term Rep. 98.

(*d*) 2 East P. C. 830.

(*e*) 2 East's Rep. 30; 2 East P. C. 831.

ing for hire, obtained money for the carriage of such goods by falsely pretending to have delivered them, and to have lost the bailee's receipt, he was convicted of obtaining such money by false pretences, and on error after conviction the judgment was affirmed.

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The preamble of the statute 30 *Geo. 2*, c. 24, which recites that frauds had been committed by evil disposed persons "to the manifest prejudice of *trade and credit*," is against the limited construction which the defendant seeks to put upon the statute; and there are many cases which show that an indictable offence is not the less indictable because it is a breach of contract. In *Treeve's case* (*a*), in 1796, the prisoner was convicted on an indictment charging a common law fraud by supplying prisoners of war with unwholesome food, not fit to be eaten by man, and the Judges held the conviction right. There the objection in arrest of judgment was, that it did not appear that what was done was in breach of any contract with the public, or of any moral and civil duty, and one does not see any reason why the act done in that case would have been less an offence if it had also been a breach of contract.

In *Rex v. Friend* (*b*) it was held to be an indictable offence in the nature of a misdemeanor to refuse and neglect to provide sufficient food for an infant of tender years, unable to provide for and take care of itself, so as thereby to injure its health; such child being an apprentice whom the party is obliged by contract to provide for. In that case *Chambre J.* thought it not an indictable offence, but a matter founded wholly on contract, but the rest of the Court held otherwise.

The decision of *Littledale J.* in *Rex v. Codring-*

(*a*) 2 East P. C. 821.

(*b*) Russ. & Ry. 20.

1854-55. *ton* (a) is relied on for the defendant. There selling
 EAGLETON'S Case. an estate, with a covenant for title where the party had previously sold his interest to another person, was held only to be a ground for a civil action. But the authority of that case is questioned, if in fact the decision is not overruled.

The learned Counsel referred to *Rex v. Crossley* (b) and *Regina v. Bates* (c).

The authority of *Rex v. Codrington* is also questioned in *Regina v. Kenrick* (d) in a considered judgment of the Court of Queen's Bench, in which it is said that the decision of Littledale J. had been lately much doubted by the Judges with reference to a case reserved by the Recorder of London. The case of *Regina v. Kenrick* was considered in this Court in *Regina v. Abbott* (e), and the decision was supported and acted upon by the twelve Judges then present.

In *Watts v. Porter* (g) ERLE J., speaking of a debtor charging as unincumbered that which is incumbered, says, "If he asserted expressly that it was unincumbered, and obtained the advance by that falsehood, he would be indictable for a false pretence."

As to the case of *Rex v. Reed* (h), which will also be relied on on the other side, Lord Denman, speaking of that case in *Hamilton v. The Queen*, says (i), "I am sure that *Rex v. Reed* was not before the Judges. That decision is not overruled now, for it never took place."

If the money in this case had been obtained by the false pretence, an offence would have been committed within the words of the statute, within the mischief pointed at by its preamble, and within the principles

(a) 1 Car. & P. 661.

(b) 2 Moo. & Rob. 17.

(c) 3 Cox Crim. Ca. 201.

(d) 5 Q. B. 49.

(e) 1 Den. C. C. 273.

(f) 3 Ell. & Bl. 760.

(g) 7 Car. & P. 848.

(h) 9 Q. B. 279.

laid down in the decided cases to which I have referred. 1854-55.

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But these counts not being for obtaining money, but for attempting to obtain it, it is objected that all that the defendant did was to attempt to obtain credit in account.

The attempt to commit a misdemeanor is a misdemeanor, whether the offence is created by statute or was an offence at common law ; *Rex v. Roderick* (*a*) ; *Regina v. Chapman* (*b*). And handing in the ticket in this case was a necessary step towards obtaining the money, and the moment a necessary step towards the completion of a misdemeanor is taken a misdemeanor is committed.

MAULE J. The doubt may arise—what is an attempt ? Must it not be a proximate attempt ? Does a man, *intending* to murder, *attempt* to do so if he buys a dagger and poison, but uses neither the one nor the other ; if a man intends to commit an offence at a distant place, getting into a railway train, or putting on his shoes, or shaving himself in the morning, would not be an attempt to do so ?

Bulwer. The returning the ticket was not an indifferent act which may mean one thing and may mean another, and although the cases put may not be sufficiently proximate, this is. The indictment charges that when the defendant made the false pretence he intended to obtain the money, and so say the jury ; and he has not the less committed the offence of attempting to obtain because the step taken by him would not necessarily have ended in a money payment.

This case is not one of cross accounts, and it is only

(*a*) 7 Car. & P. 795.

1 Greaves Russ. on Crimes, 47.

(*b*) 1 Den. C. C. 432 ; and see

1854-55. in the event of the defendant committing a breach of contract or a fraud that any cross accounts can arise. The assumption of a cross account is not warranted by the case in which it is stated that the contractor on returning the tickets is credited in account, and “is paid at the time mentioned in the contract.”

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For this objection, *Rex v. Wavell* (*a*), *Reg. v. Crosby* (*b*) and *Reg. v. Garrett* (*c*) are relied upon. In *Wavell's* case you could not say what specific sum was paid on account of the false check. You could not say what checks were paid on account of the good securities and what on account of the bad; all that could be obtained by the defendant was credit in account; and Lord *Tenterden* observes, in the course of the argument, “he only obtains credit in account; somebody else receives the money.”

In *Reg. v. Crosby* the charge was for obtaining and not for attempting to obtain, and no money was in fact obtained, but only credit in account. The ground of the judgment in *Reg. v. Garrett* was, that no money could have been obtained by the defendant, even if his fraud had succeeded. In this case money might have been obtained: the intention of the defendant was to obtain it; and, according to the course of dealing between the parties, if the fraud had not been discovered, he would have obtained it.

As to the first seven counts, I do not dispute that *Rex v. Wheatley* (*d*), and *Rex v. Osborn* (*e*) are law; but the ground on which I proceed is, that the facts charged show a fraud which is public in its nature and indictable at common law. The poor are not a limited but an unlimited class of persons, and may include the whole kingdom, as every poor person

(*a*) 1 Moo. C. C. 224.

(*b*) 1 Cox C. C. 10.

(*c*) *Ante*, p. 232.

(*d*) 3 Burr. 1125.

(*e*) 3 Burr. 1697.

who becomes destitute in a parish becomes entitled to relief. The 4th count charges an intent to cheat and defraud the poor, and that intent is evidenced by the defendant's particular acts. Thus, if a man sells by false scales, it is evidence of an intent to cheat every person he may deal with; *Rex v. De Berrenger* (*a*), *King v. The Queen* (*b*). It was a fraud upon the guardians, who represent the class of ratepayers, and a fraud upon the guardians as public officers acting under the Poor Law Commissioners.

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PLATT B.—Defrauding a member of a class is not defrauding the class. Do you say the delivery of a loaf short of weight to one pauper was a fraud on the poor as a class?

Bulwer. I say it is evidence of it. The learned Counsel also referred to *Rex v. Dixon* (*c*), *Rex v. Young* (*d*), *Rex v. Brisac and Scott* (*e*), *Rex v. Haynes* (*g*), *Reg. v. Wickham* (*h*), *Rex v. Woolley* (*i*), *Reg. v. Warren* (*k*), *Rex v. Booth* (*l*), when it was intimated by the Court that the argument as to those counts ought not to be further proceeded with.

Clerk (*Mills* and *Poland* with him) then replied as to the last three counts, and contended that they did not disclose any offence. There is nothing to shew any liability in the relieving officer to pay for the bread supplied, or to show how the defendant, by making the alleged assertion as to the weight of the loaves, could obtain money from the guardians. Secondly, there is no false representation by the defendant for the purpose of obtaining the money. Nothing is said by him as to the weight of the loaves;

(*a*) 3 M. & S. 67.

(*b*) 7 Q. B. 795.

(*c*) 3 M. & S. 11.

(*d*) 3 Term Rep. 98.

(*e*) 4 East Rep. 164.

(*g*) 4 M. & S. 214.

(*h*) 10 A. & E. 34.

(*i*) 1 Den. C. C. 559.

(*k*) Russ. & Ry. 48, n.

(*l*) Russ. & Ry. 47, n.

EAGLETON'S Case. 1854-55. but having delivered the loaves to the persons presenting tickets, he afterwards returns the tickets to the relieving officer, as he was bound by his contract to do.

MAULE J.—The returning the tickets by the defendant was a representation by him that there were *in rerum naturâ* so many ounces of bread, which was not so in fact. I believe we all think that what took place amounted to a representation by the defendant to the guardians that he had delivered a certain number of loaves of a certain weight.

Clerk. Thirdly, there was no false pretence within the provisions of the 53rd section of 7 & 8 Geo. 4, c. 29. That question was not one of fact for the jury, but was entirely a question of law for the Court. The statute was intended to apply to cases where the whole transaction was false and fraudulent, and not to fraudulent breaches of contract; the preamble shows that the object was to meet cases of fraud which, in their nature, would be analogous to stealing; and I think I shall be able to show that the decided cases bear out that view of the statute, and that it was never intended to apply to fraudulent breaches of contract.

In *Young and others v. The King in error* (a) the story told by the prisoner was entirely false, and he never intended to give any consideration. In *Hamilton v. The Queen in error* (b), the entire pretence was false. So in *Rex v. Barnard* (c) the whole story was false, and so it was in *Reg. v. Bates* (d), *Rex v. Crossley* (e), and in the older case of *Rex v. Airey* (g).

In *Witchell's case* (h) the whole story as to the men

(a) 3 Term Rep. 98.

(b) 9 Q. B. Rep. 271.

(c) 7 Car. & P. 781.

(d) 3 Cox C. C. 201.

(e) 2 Moo. & R. 17.

(g) 2 East Rep. 30.

(h) 2 East P. C. 830.

who had not been employed, and as to the work which had not been done, was false. 1854-55.
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MAULE J.—There the defendant, being entitled to something, delivered false accounts so as to make out that he was entitled to something more. That may raise a difficulty upon you, as the Judges held that case clearly within the statute.

WILLIAMS J.—Suppose a builder having contracted to build a house, obtains the price by a false pretence that he has built it, he having in fact done nothing towards it, is that within the statute?

Clerk. Yes.

WILLIAMS J.—But suppose he had completed it all but the roof, would the pretence then be within the statute?

Clerk. Perhaps I might admit that; but suppose the contract was that *Memel* timber should be used, and the contractor used *Canadian* timber, and then alleged that the house was completed according to the contract, or if he alleged that the work was done in a workmanlike manner when it was not, I should say it would not be within the statute.

There is a case decided by a Judge of very great authority, *Rex v. Pywell* (*a*), in which Lord *Ellenborough* held that an indictment would not lie for a deceitful representation and warranty of the soundness of a horse (*b*); it is true that the marginal note in *Reg. v. Kenrick* (*c*) and the observations of Lord *Denman* in that case are at variance with that doctrine; but the observations of Lord *Denman* were not necessary to the judgment which was upon the first three counts of the indictment, all of which charged a conspiracy.

(*a*) 1 Stark. Rep. 402.
(*c*) 5 Q. B. 49.

(*b*) But see *R. v. Rowlands*, 2 Den. C. C. 364.

1854-55. Then, as to *Watts v. Porter* (*a*), the dictum of ERLE J. in that case was not necessary to the judgment.

EAGLETON'S Case. As to *Reg. v. Abbott* (*b*) and the other cases decided with it, they were not argued by Counsel, and the Court proceeded on *Reg. v. Kenrick*; but the defendants in those cases not only warranted the cheese they sold, but put a piece of good cheese into the bad cheese, using a fraudulent device, which might be indictable at common law; but I doubt whether it is within the statute.

There is also the case of *Reg. v. Ball* (*c*), in which a man represented to a pawnbroker that eleven thimbles, which he wanted to pawn, were silver; but the pawnbroker, on testing them, found they were not, and did not give him any money, and it was there held that the conduct of the prisoner amounted to an attempt to commit the statutable misdemeanor of obtaining money by false pretences. The authority of this case is however questionable, and there does not seem to be any reported case which had previously decided the question. The decision is at variance with a previous case of *Reg. v. Tabram* (*d*), and it does not appear who the Judges were with whom Mr. Serjeant *Mirehouse* consulted before delivering judgment.

In *Rex v. Reed* (*e*), which is perhaps in its circumstances the nearest to *Reg. v. Ball*, the prisoner had sold coals with a false representation of their value. That case was tried before *Tindal* C. J., and the prisoner's Counsel having moved in arrest of judgment, the question was reserved for the consideration of the Judges; and in the ensuing Term the case was considered by the Judges, who held the conviction wrong.

(*a*) 3 Ell. & Bl. 760.

(*b*) 1 Den. C. C. 273.

(*c*) Car. & Marsh. 249.

(*d*) Cited Car. & Marsh. 251.

(*e*) 7 Car. & P. 849.

It is true that Lord *Denman* is stated, in *Hamilton v. The Queen*, to have said, that *Reg. v. Reed* never was considered by the Judges; but, besides the report of it (a), it is again referred to in a note to *Reg. v. Ball* (b), as having been decided by the fifteen Judges.

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MAULE J.—Suppose the defendant had said, I have delivered one hundred loaves, when he had in fact only delivered fifty, that might have been a false pretence; but a false representation as to the weight may be a different thing.

WIGHTMAN J.—Suppose he had said, I have delivered one hundred loaves in pursuance of and in accordance with the contract.

Clerk. If that would be a false pretence, it would equally be so if he said, I have delivered bread, made of the best household flour, when it was in fact made of flour of an inferior quality; or if he had said that the bread was baked for so many hours, when in fact it had not been baked so long.

POLLOCK C. B.—I doubt much whether any real dealing about buying and selling is within the statute. If the buying and selling are merely a pretence in order to cheat it is a different thing.

Clerk. If in a case like this the defendant would be indictable, every breach of contract followed by a representation that the contract had been performed would be equally so. The question really is, whether a contractor does by sending in an account charging for that as done according to contract which is not so done (for returning the tickets in this case was nothing more) make such a false pretence as renders him liable to indictment. But even if there was any false

(a) 7 Car. & P. 848.

(b) Carr. & Mar. 253, n. (a).

1854-55. pretence at all, all the prisoner attempted to obtain by it was credit in account. The attempt to be indictable must be such as must, if successful, obtain money ; and an indictment would be bad which merely alleged that the defendant by false pretences obtained or attempted to obtain credit in account.

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The case of *Regina v. Wavell* (*a*) is, I apprehend, decisive of this point. The money, according to the contract, was not to be paid till a certain time had elapsed, and there might then be a balance in favour of the guardians and against the defendant ; and, in fact, in this case the time for payment had not arrived when the trial of the defendant took place. The case of *Reg. v. Crosby* (*b*), is also in point. There the prisoner having entered into an agreement to act as captain of a certain vessel belonging to the prosecutor upon receiving two-thirds of the net profit of the vessel delivered in a bill for repairs to a larger amount than he had actually paid, and was allowed the amount in the settlement of accounts, and it was held by *Maule J.*, that an indictment for obtaining money by false pretences would not lie, since the prisoner did not by the false pretences obtain that amount of money, but only credit for the difference between the amount actually paid and the amount which he charged. So here no specific sum of money could have been obtained by the alleged false pretence, and all that the defendant could possibly obtain was credit in account. The decision in *Reg. v. Garrett* (*c*), proceeds upon the same principle. It being then clear that an indictment for attempting to obtain credit in account would be bad ; although the indictment in this case charges an attempt to obtain money, the evidence only proves an attempt to obtain

(*a*) 1 Moo. C. C. 224.

(*b*) 1 Cox C. C. 10.

(*c*) *Ante*, p. 232.

credit in account, and the defendant was in fact convicted before the time for payment of the money arrived. 1854-55.
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Cur. adv. vult.

The judgment of the Court was delivered on the 9th day of *July*, 1855, by 1855.

PARKE B.—This case came originally before the Court of Criminal Appeal in the beginning of last year.

It was reserved by Mr. Palmer, the Recorder of *Great Yarmouth*, upon a trial before him of an indictment containing ten counts. The first seven charged the defendant, a baker, with a fraud. He is alleged to have contracted with the guardians of the poor to deliver for a certain term to the out-door poor of the parish of *Great Yarmouth*, in such manner as the guardians, or any other person authorized by them, should direct, quantities of bread made of the best household flour, in loaves, each loaf weighing three pounds and a half, to be paid for at seven pence a loaf; and is charged with having delivered loaves to different poor people of less weight, intending to deprive them of proper food and sustenance, and to endanger their healths and constitutions, and to defraud the guardians of the poor.

The last three counts charge the defendant with a misdemeanor in attempting to obtain money from the guardians, by falsely pretending to the relieving officer that he had delivered to certain poor persons a certain number of loaves, and that each of those loaves weighed three pounds and a half.

The Court of Criminal Appeal, which sat on the 28th *April*, 1854, thought that the defendant could not be convicted on any of the first seven counts, as the delivering less than the quantity contracted for

1855. was a mere private fraud, no false weights or tokens having been used, and further that it did not appear to be indictable on the ground that the defendant delivered unwholesome provision, nor was that offence charged in the indictment. But the Judges then forming the Court were inclined to think that the three last counts were maintainable; but, as it was contended on the part of the defendant that the evidence first stated by the learned Recorder did not appear to make out the specific offence mentioned in those counts, the case was referred back to him to state the evidence more fully. This was done, and the amended report considered on the 3rd *June*, 1854, before Lord CAMPBELL C. J. and ALDERSON B., COLERIDGE J., MARTIN B. and CROWDER J. Upon the argument the learned Judges doubted of the propriety of the conviction on the last three counts, and desired the case to be argued before the fifteen Judges.

Accordingly JERVIS C. J., POLLOCK C. B., PARKE B., ALDERSON B., ERLE J., PLATT B., MARTIN B. and CROMPTON J. assembled on *December* 2nd, 1854, and on *February* 3rd, 1855, JERVIS C. J., PARKE B., MAULE J., WIGHTMAN J., CRESSWELL J., PLATT B., WILLIAMS J., CROMPTON J. and MARTIN B. (a), on which last day the case was fully argued by Mr. *Bulwer* for the prosecution, and Mr. *Clerk* for the prisoner.

It was contended by Mr. *Clerk* for the prisoner that the indictment for attempting to obtain money by false pretences could not be supported, because the offence of obtaining money under false pretences was

(a) It will be seen on reference to the report, *ante*, pp. 519, 521, that the statement there made of the Judges present on these occasions does not agree with that in the judg-

ment, but the reporter, on referring to the Minute Book kept by Mr. *Straight*, clerk of the Court, finds that the entry there is the same as in the report.

committed only when the money was obtained wholly without consideration, and the offence was analogous to larceny, of which the prisoner might by stat. 7 & 8 Geo. 4, c. 29, s. 53, be convicted, in case the offence should appear on the trial to be larceny.

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There are many cases, no doubt, as is mentioned in that section, in which the distinction is very subtle between the misdemeanor of obtaining money under false pretences and larceny, and it was very proper to make that provision in the statute; but it does not follow that all the cases of obtaining money by false pretences are of that description. But it was strongly contended that the statute against obtaining money by false pretences applied to no cases where there was some bargain or consideration for giving the money, and so some cause for the giving, other than the false pretence: as where goods were sold under a false representation of the quality or value, and the purchaser had the commodity; otherwise the range of indictable offences would be greatly extended and breaches of contract made the ground of criminal proceedings.

If this had been the case of a sale of bread to the prosecutors, with a false representation of the weight, and an attempt thereby to receive a larger price than was really due, we should have had to decide whether an indictable offence had been thereby committed, and should have had to consider the case of *The Queen v. Kenrick* (*a*), which was a case of the sale of horses by means of a false representation of their being the property of a private gentleman and quiet to ride and drive; and also that of *The Queen v. Abbott* (*b*), decided upon the authority of *The*

1855. *Queen v. Kenrich.* In all these cases the prosecutor did not part with his money merely on account of the false pretences, but principally because he had a consideration for it in the property vested in him by the contract.

EAGLETON'S Case. But this is not the case of a sale of goods by a false pretence of their weight; it is an attempt to obtain money by the false and fraudulent representation of an antecedent fact, viz., that a greater number of pounds of bread had been delivered than had been actually delivered, and that representation made with a view of obtaining as many sums of 2d. as the number of loaves falsely pretended to have been furnished amount to.

In this respect the present case exactly resembles that of *The King v. Witchell* (*a*), where the prisoner obtained money by the false pretence that certain workmen, whom it was his duty to pay, had earned more than they really had, and there since are cases of similar convictions where the prisoner falsely stated the quantity of work which he had done, according to which he was to be paid; we therefore think that the indictment would be maintainable if the money had been obtained. A second objection was, that the defendant was not to obtain the price of the number of pounds falsely stated to have been delivered in cash, but only to have *credit in account*.

The statement of the learned Recorder is, that the defendant was to return the tickets given to the paupers by the relieving officer, and by them delivered to the defendant on receiving the loaves, and upon such return, with a written statement of the amount of loaves on the following week, would be credited in the relieving officer's book for the amount, and the

money would be paid at the time stipulated in the contract ; that is, on two calendar months from the 25th *March* following. No further step would be necessary for the defendant to receive payment. The defendant did obtain credit in account from the relieving officer in effect for the amount of the number of pounds falsely represented to have been delivered. Further, the contract with the board of guardians stipulates, that if the defendant should fail in his performance of it the board of guardians might deduct the damages and costs sustained thereby from the sum payable to him for loaves supplied. On the part of the defendant his learned Counsel contended: first ; that the attempt to obtain credit in account for a sum of money by delivering up the tickets as vouchers was not in itself an attempt to obtain *money* within the meaning of the statute, for that credit in account was not equivalent to money ; and no doubt the credit in the relieving officer's book was not equivalent to money, and the defendant could not have been convicted of the offence of actually obtaining money by false pretences.

Secondly, he contended that the credit in account would not necessarily lead to an ultimate payment, for there might be deductions for breaches of contract, which would prevent any payments in cash by the guardians.

We have had great doubt on this part of the case, but do not think that this objection should prevail. We think that the contingency of the whole sum due to him, being subject to deductions in a future event, does not the less make the obtaining credit an attempt to obtain money, if it would be so without that contingency ; but our doubt has been whether the obtaining that credit, though undoubtedly a necessary step towards obtaining the money, can be deemed an

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1855. *attempt* to do so? The mere intention to commit a ~~EAGLETON'S~~ misdemeanor is not criminal. Some act is required, Case. and we do not think that *all* acts towards committing a misdemeanor are indictable. Acts remotely leading towards the commission of the offence are not to be considered as attempts to commit it, but acts immediately connected with it are; and if, in this case, after the credit with the relieving officer for the fraudulent overcharge, any *further step* on the part of the defendant had been necessary to obtain payment, as the making out a further account or producing the vouchers to the Board, we should have thought that the obtaining credit in account with the relieving officer would not have been sufficiently proximate to the obtaining the money. But, on the statement in this case, no other act on the part of the defendant would have been required. It was the last act, *depending on himself*, towards the payment of the money, and therefore it ought to be considered as an attempt. The receipt of the money appears to have been prevented by a discovery of the fraud by the relieving officer; and it is very much the same case, as if, supposing rendering an account to the guardians at their office, with the vouchers annexed, were a preliminary necessary step to receiving the money, the defendant had gone to the office, rendered the account and vouchers, and then been discovered, and the money consequently refused.

Conviction on the last three counts affirmed.

Coo & Saund. Etat. xc///

REGINA v. WILLIAM ROBERTS.

1855.

THE following case was reserved for the opinion of the Court of Criminal Appeal, by Mr. Justice WILLES.

William Roberts was tried before me at the *Warwick* Summer Assizes, 1855, upon an indictment containing several counts to the effect following, that is to say.

1st Count. For unlawfully, knowingly, and without lawful authority or excuse, making, and causing to be made, cut, and engraved, two dies, one of the obverse side, the other of the reverse side of a silver half-dollar of *Peru*, not being coin current in this realm, with intent to use them, and by means thereof feloniously and against the form of the statute to make counterfeit *Peruvian* half-dollars, and so attempting to make such counterfeit coin.

2nd Count. Same as first, except a verbal difference in describing the dies.

3rd Count. Same as first, only saying "obtained and procured," instead of "made and caused to be made."

4th Count. Same as second, with like difference as between first and third.

5th Count. For attempting feloniously and against the form of the statute to coin, as in first count, by

coins in *England* by way of trying whether the apparatus would answer before sending it out to *Peru* to be there used in making counterfeit coin. Held, 1. That to make a few coins in *England* with the object stated would be to commit the offence of making counterfeit foreign coin within the statute 37 Geo. 3, c. 126, s. 2. 2. That the procuring the dies was an act in furtherance of the criminal purpose sufficiently proximate to the offence, and sufficiently shewing the criminal intent to support an indictment founded upon it for a misdemeanor.

The prisoner, with the intent to coin counterfeit half-dollars of *Peru*, caused to be made and procured in this country dies necessary for the purpose of making such counterfeit coin, but which would not alone produce it; but the prisoner intended to procure the rest of the necessary apparatus for the purpose and with the intention of using the entire apparatus, when procured, in making the counterfeit coin. The jury found that the prisoner intended to make only a few of the counterfeit

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making, &c., the dies with intent to use them in coining such counterfeit coins, and also by procuring, &c., two galvanic batteries suitable and necessary for the purpose, and also by procuring, &c., acids and other chemicals suitable and necessary for the purpose.

6th Count. For attempting to coin silver half-dollars of *Peru* (without stating the means).

So much of the indictment as appears necessary is copied in the accompanying paper marked A, which may be referred to as part of this case (a).

(a) The following is the abbreviated copy of the indictment marked A. above referred to:—

Warwickshire. The jurors for our Lady the Queen present that *William Roberts* on the 5th day of *July* in the year of our Lord 1855 at the parish of *Birmingham* in the county of *Warwick* unlawfully knowingly and without any lawful authority or excuse did make and cause to be made cut and engraved two certain dies upon one of which there was then made and impressed the figure stamp and apparent resemblance of one of the sides (to wit the obverse side) of a certain silver coin (not the proper coin of this realm nor permitted to be current within the same) called a half-dollar being a silver coin of a certain foreign country to wit *Peru* in *South America* in parts beyond the seas and in and upon the other of which said dies there was then made and impressed the figure stamp and apparent resemblance of the other side to wit the reverse side of the said silver coin of the said foreign state with intent in so doing to use the said dies and by means of the said dies so made as aforesaid feloniously and contrary to the form of the statute in such

case made and provided to make coin and counterfeit divers pieces of coin not being the proper coin of this realm nor permitted to be current within the same but resembling and looking like and intending to resemble and look like the said silver coin called a half-dollar of the said foreign country and so the jurors aforesaid upon their oath aforesaid do say that the said *William Roberts* in manner and form aforesaid unlawfully did attempt feloniously to make coin and counterfeit certain coin not the proper coin of this realm nor permitted to be current within the same but resembling silver coin of the said foreign country to wit *Peru* aforesaid against the peace &c.

2nd Count like 1st count, only substituting the words scored under for those scored under in the 1st count. Unlawfully &c. did make two certain dies one of which would make and impress the figure stamp and apparent resemblance of one side* &c. and the other of which &c.

3rd Count. Same as 1st count, substituting the words "did obtain and procure" for the words "did

* The words scored under in the original case are here printed in *italics*.

It appeared at the trial that early in the present year (1855) the prisoner, without any authority or license so to do, ordered and caused to be made by and procured of *William Johnson*, a die sinker at *Birmingham*, in *Warwickshire* (who, though he executed the order, gave notice to the police immediately upon

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make and cause to be made," referring to dies in the first count.

4th Count. Same as second, substituting the words "did obtain and procure" for the words "did make and cause to be made," referring to dies in second count.

5th Count. And the jurors &c. that the said *William Roberts* afterwards to wit on the day and year aforesaid unlawfully did attempt and endeavour feloniously and against the form of the statute in that case made and provided to make coin and counterfeit certain coin not being the proper coin of this realm nor permitted to be current within the same but resembling and looking like and intended to resemble and look like and pass as certain silver coin of a certain foreign state and country to wit *Peru* in *South America* in parts beyond the seas called half-dollars by then and there to wit on the day and year aforesaid and at the parish aforesaid unlawfully and without any lawful authority or excuse making and causing to be made and obtaining and procuring and taking into the possession of him the said *William Roberts* two certain dies (upon one of which there was made and impressed and one of which would make and impress and was intended to make and impress the figure stamp and apparent resemblance of one side of the said silver coin of the said foreign state and country and upon

the other of which said dies there was made and impressed and the other of which said dies would make and impress and was intended to make and impress the figure stamp and apparent resemblance of the other side of the said silver coin) he the said *William Roberts* then and there purposing and intending to use the said dies and therewith feloniously to make coin and counterfeit the said coin as aforesaid and also by then and there procuring and obtaining and taking into the possession of him the said *William Roberts* divers to wit two galvanic batteries and other galvanic apparatus and other apparatus suitable and necessary for the purpose of making coining and counterfeiting the said coin as aforesaid and also by then and there procuring and obtaining and taking into the possession of him the said *William Roberts* divers large quantities of acids and other chemical substances suitable and necessary for the purpose last aforesaid against the peace &c.

6th Count. Did attempt and endeavour feloniously to make coin and counterfeit certain coin not the proper coin of this realm nor permitted to be current within the same but intended to resemble and look like the said silver coin to wit the coin called half-dollars of the said country to wit *Peru* aforesaid against the peace &c.

1855. receiving it, and committed no offence against the law in the transaction), the necessary dies for making a counterfeit half-dollar, being a silver coin of a foreign country, namely the Republic of *Peru*, not being a coin of or permitted to be current in this realm.

ROBERTS's Case. The dies, though suitable and necessary for making such counterfeit coin, could not alone produce it; a press, copper, blanks, galvanic battery, and a preparation of silver being also necessary for that purpose.

The prisoner had procured galvanic batteries, and had been in negotiation for the purchase of a press and copper blanks for the aforesaid purpose, but he was not proved to have actually procured either press, blanks, or preparation of silver.

The prisoner caused to be made and procured the dies in *Birmingham*, and intended to procure the rest of the necessary apparatus there for the purpose and with the intention of using the entire apparatus when procured, including the dies, in making counterfeit *Peruvian* half-dollars, resembling the genuine coin, and the only disputed question of fact at the trial was whether he intended to coin in *Peru* only, or whether he intended also to coin in this country.

There was evidence for the consideration of the jury on both sides of this question, and the learned Counsel for the prosecution and the prisoner respectively addressed the jury upon it.

It was contended on behalf of the prisoner that there was no proof of the sixth count, charging an attempt to coin, the complete apparatus not appearing to have been procured; but as it was arranged that the question whether any such offence against the law as alleged had been committed should be reserved, I thought it better not to make a distinction between the counts at the trial.

It was further contended on behalf of the prisoner that the jury ought, upon the evidence, to find that he only intended to make the coin in *Peru*, and not in *England*, in which case it was argued that no offence against the law of *England* had been committed.

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It was further contended upon behalf of the prisoner that even if he did intend to coin in this country, that intention, though coupled with the act of causing the dies to be made and procuring them in pursuance of such an intention, fell short of an attempt to commit a felony, and therefore was not an offence.

I told the jury *inter alia* that if the intention of the prisoner in procuring the dies was to procure the necessary apparatus complete, and therewith including the dies to make any number, however small, of counterfeit *Peruvian* half-dollars resembling that coin, even one, in *England*, the unauthorized causing to be made and procuring the dies in pursuance of and with a view to carry into effect that intention, would, in my opinion, be a misdemeanor.

The jury stated it to be their opinion that the intention of the prisoner was to cause to be made and procure the dies and other necessary apparatus in order therewith to coin counterfeit *Peruvian* half-dollars, and to make a few only of the counterfeit coin in *England* by way of trying whether the apparatus would answer before sending it out to *Peru* to be there used in making the counterfeit coin.

I directed the jury, if they thought that the dies were caused to be made and procured by the prisoner, as already mentioned, in pursuance of and in order to effect that intention, to find the prisoner guilty, which they accordingly did.

I thereupon postponed the judgment until the next Assizes, admitting the prisoner to bail, and reserved for the opinion of the justices of either bench and

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Barons of the Exchequer, according to the statute, the following questions which arose at the trial, namely:

Whether the prisoner, by so causing to be made and procuring the dies as aforesaid, with the intention of using them, together with the rest of the necessary apparatus, when procured, in coining a few counterfeit *Peruvian* half-dollars in *England*, in order to try the apparatus before sending it to *Peru*, to be there used for making the counterfeit coin, was guilty of an offence against the law of this country, and whether any or either of the counts of the indictment alleged such offence?

See 37 *Geo. 3*, c. 126, s. 2, and *Dugdale v. The Queen* (1 *Ellis & Blackburn*, 435).

JAS. S. WILLES.

This case was argued on the 24th November, 1855, before JERVIS C. J., PARKE B., WIGHTMAN J., CRESSWELL J. and WILLES J.

O'Brien (with him *Brewer*) appeared for the prisoner.

Bittleston (with him *Cockle*) for the Crown.

O'Brien, for the prisoner. The counts of the indictment as framed, coupled with the intent as found, do not disclose any offence.

The making such coin as this is prohibited by 37 *Geo. 3*, c. 126. The words of the second section are as follows: "And whereas the practice of counterfeiting foreign gold and silver coin and the bringing into this realm, and uttering within the same false and counterfeit foreign gold and silver coin, and particularly pieces of gold coin commonly called *Louis d'Ors* and pieces of silver coin commonly called dollars, hath of late greatly increased, and it is expedient that provision should be made more

effectually to prevent the same : Be it enacted that if any person or persons shall from and after the passing of this Act make, coin or counterfeit any kind of coin, not the proper coin of this realm, nor permitted to be current within the same, but resembling or made with intent to resemble, or look like any gold or silver coin of any foreign prince, state or country, or to pass as such foreign coin, such person or persons offending therein shall be deemed and adjudged to be guilty of felony."

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First, I contend that the acts alleged and found do not amount to an attempt to make counterfeit foreign coin, and I also contend that the acts found, although coupled with intent to coin in England, do not amount to an offence. There is no foundation for the proposition that *any* act done towards the commission of a felony or a misdemeanor is an indictable offence. The act must be immediately connected with the offence. The last case on the subject is *Dugdale v. Regina* (*a*), in which it was held, that although it is a misdemeanor to procure indecent prints with intent to publish them, it is not a misdemeanor to preserve and keep such prints in possession with such an intent.

Suppose in that case the prisoner had procured certain materials, say a brush and paper for the purpose of painting indecent pictures with the intention of afterwards circulating them, he would not by so doing have been guilty of an indictable offence. The decision in *Reg. v. Eagleton* (*b*) shows that acts remotely leading towards the commission of an offence are not to be considered as attempts to commit it.

In this case the procuring the dies was not an act immediately connected with the offence of coining in

1855. *England.* In order to commit that offence it would be necessary that the prisoner should have, not only dies, but copper blanks, a preparation of silver, and other things which he did not possess.

ROBERTS'S
Case.

The possession of the dies was no more immediately connected with the offence of coining than the taking a railway ticket to go to *Birmingham* for the purpose of procuring them would be. I apprehend that the phrase "immediately connected" with an offence means that there shall be nothing intermediate, nothing shall come between the act done and the commission of the offence itself. The doctrine that an act, coupled with an intent, is indictable, is unsupportable, and arose entirely from *Rex v. Sutton* (*a*). There the prisoner was convicted of unlawfully having in his possession two iron stamps and a silver sixpence coloured, with the intention of making and passing off counterfeit coin as half guineas. But the case was overruled in *Rex v. Heath* (*b*) ; and if that decision does warrant the proposition I have referred to, I submit that it is not law. *Rex v. Fuller* (*c*) proceeded upon *Rex v. Heath*, but both in *Rex v. Fuller* and *Dugdale v. Regina* the acts done were all that was necessary to be done up to the completion of the offence ; in neither case was there any other act to intervene before the commission of the offence. But here there were several acts to be done ; a small portion only of the machinery necessary for coining had been provided ; there were no copper blanks, no galvanic battery, and no preparation of silver.

WIGHTMAN J.—Are not the acts done immediately connected, not remotely, with the completion of the offence ?

O'Brien. The difficulty will be in drawing the line,

(*a*) 2 Strange, 1074, and Cases temp. Hardwicke.

(*b*) Russ. & Ry. 184.

(*c*) Ibid. 308.

unless you rely on the principle that all acts done in furtherance of an intent amount to an attempt.

1855.

ROBERTS'S
Case.

WIGHTMAN J.—You alluded to the getting a railway ticket to *Birmingham*; that is not necessarily connected with the offence, it might be for other purposes; but it is difficult to get over the possession of the dies. Here are two dies, the obverse side and the reverse side of a *Peruvian* half-dollar, applicable to making them. I do not see how they could be applied to anything else.

O'Brien. With regard to the intent, I apprehend the mere going to *Birmingham* has as much to do with it as the possession of the dies. The procuring the dies to be made might be in consequence of an order he had received from *Peru*; so far as the dies are concerned there is nothing criminal in procuring them any more than in going to *Birmingham*. I submit that all that has been done in this case cannot be construed into an attempt at coining, because I submit that an attempt must be an endeavour to do something within present capacity, and not that which, with the aid of other things, may be accomplished at a subsequent period. In *Regina v. Williams* (a) the prisoner was indicted for an attempt to administer poison, and it was held that the giving the poison into the hands of a third person, and the endeavouring to procure that third person to administer it, was not an attempt to administer poison.

CRESSWELL J.—That case was tried before Lord *Cranworth*. The decision was on the construction of the words used in that particular statute; but the same prisoners were afterwards tried before me on an indictment for the misdemeanor of doing the acts with a criminal intent, and were convicted on proof of the same facts.

(a) 1 Den. Cr. Ca. 39.

1855.

ROBERTS's Case.

O'Brien. There is another point with regard to the finding of the jury. There can be no doubt, on reading the statute, that the offence contemplated and provided for was that of making counterfeit coin in *England*. Now, the jury found that the dies were procured to coin counterfeit *Peruvian* half-dollars, and to make a few only in *England* by way of trying whether they would answer, before sending them to *Peru*, to make coin there. The finding of the jury amounts to this, that he was providing himself with this apparatus for the purpose of coining in *Peru*, and that the acts done in this country were merely for the purpose of ascertaining whether the dies would answer.

JERVIS C. J.—Suppose he had made these few specimens in this country, would not that have been making false coin within the statute?

CRESSWELL J.—If he had made them, what would he make them for?

O'Brien. To ascertain whether they would answer his purpose.

JERVIS C. J.—What purpose?

O'Brien. The making coin in *Peru*.

PARKE B.—Would not the doing that constitute a felony, and be indictable under the Act of Parliament?

O'Brien. I apprehend that a person striking off a few impressions of coin would not necessarily be so; but there must be a making for the purpose of circulating.

JERVIS C. J.—Is it necessary in charging a person with coining to say that he does so for the purpose of circulating?

O'Brien. No, my Lord, because that is included in the meaning of coining; but a person may make specimens of foreign coins for the purpose of placing them in a museum, or for any other innocent purpose.

JERVIS C. J.—The making is an offence. A man

has no right to say I did not intend to commit a felony ; I only made a few specimens to put in a cabinet. It is coining ; and the object of the act is to prevent coining.

1855.

ROBERTS'S
Case.

O'Brien. The jury do not find that he coined for the purpose of circulating abroad.

PARKE B.—The statute does not say for the purpose of circulating abroad.

WIGHTMAN J.—I must pause before I come to that conclusion that a man could legally procure dies to make false coin for the purpose of placing them in a museum.

O'Brien. I submit that to constitute the offence a man must make the coin for the purpose of circulation with a view to defraud.

JERVIS C. J.—The act is directed against the *making* of false money.

WIGHTMAN J.—The question is not what a man means to do with the coin after it is made.

O'Brien. If it is made for the purpose of putting into a museum, I submit it is not money.

JERVIS C. J.—What would it be then ?

O'Brien. A coin, an imitation of a current coin.

CRESSWELL J.—If it is a coin, it is making coin within the words of the statute.

O'Brien. I apprehend the words were used to protect the circulating medium, to control the circulation of counterfeits of any kind ; it is against a mischief of that kind that the statute is directed. I therefore submit first, that the acts done by the prisoner do not amount to an attempt, and are too remotely connected with the offence of coining to be indictable ; and secondly, as to the finding of the jury, that the acts stated were not exclusively due to the design of making coin in this country. When the prisoner ordered the dies, the finding of the jury is that he did

1855. so for the purpose of preparing an apparatus to make coin in *Peru*; the act therefore was not done with intent to coin in this country, and if coin had been made in the manner and for the purpose stated in the case, it would not have been an offence within the statute.

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Bittleston, for the Crown, was not called upon.

Jervis C. J.—I am of opinion in this case that the conviction is right. This is not an indictment for an attempt to commit a statutable offence, as was the case in *Reg. v. Williams* (*a*), where the charge was an attempt to administer poison. Here there is no direct attempt to coin; but the indictment is founded on a criminal intent, coupled with an act immediately connected with the offence. It is difficult, and perhaps impossible, to lay down a clear and definite rule, to define what is, and what is not such an act done, in furtherance of a criminal intent, as will constitute an offence; at all events I shall not attempt to do so. Many acts, coupled with the intent, would not be sufficient. For instance, if a man intends to commit a murder, and is seen to walk towards the place of the contemplated scene, that would not be enough; but although it is sometimes difficult to say whether a case comes within or ranges without the line, it is not difficult to say that the act done in this case is one which falls within it. Nobody can doubt that the prisoner was in possession of machinery necessarily connected with the offence, for the express purpose of committing it, and which was obtained and could be used for no other purpose. Perhaps my learned brothers may define the line, but I will not do so; it is sufficient that in my opinion this case is within it.

Parke B.—I think it would be wasting time to

discuss whether the offence imputed falls on one side or the other of a certain line. I quite agree that if the prisoner had gone to *Birmingham* merely to procure dies that would be too remote. I quite agree with the law laid down in *Reg. v. Eagleton* (*a*), that an attempt at committing a misdemeanor is not an indictable attempt unless it is an act directly approximating to the commission of an offence, and I think this act is a sufficient approximation. I do not see for what lawful purpose the dies of a foreign coin can be used in *England*, or for what purpose they could have been procured except to use them for coining. The acts done are clearly sufficiently leading to the offence to be indictable.

WIGHTMAN J.—I am of the same opinion. No doubt the act was done with intent to commit a felony, and is sufficient to support such an indictment as the present one. It is an act immediately connected with the commission of the offence; and in truth the prisoner could have no other object than to commit the offence. Every case must be taken with its own peculiar circumstances. It is impossible to lay down an exact rule, but it appears to me that an act has been done in the present case sufficient to support the indictment.

CRESSWELL J.—I agree with my learned brothers that the act done in this case is sufficiently proximate to the offence.

WILLES J.—I expressed my opinion at the trial.

Conviction affirmed.

(*a*) *Ante*, p. 515.

1855.
ROBERTS's
Case.

1855.

REGINA v. WILLIAM JARVIS.

The prisoner was indicted under the 2 Wm. 4, c. 34, s. 8, for having in his possession counterfeit coin, knowing it to be counterfeit, and with intent to utter and put off the same. The police officer who searched the prisoner found upon him, in different pockets of his dress, four counterfeit crowns of the same date and mould, thirteen counterfeit half-crowns of the same date and mould, fourteen counterfeit shillings of the same date and mould, (each of the said counterfeit coins being wrapped in a separate piece of paper), and four shillings in good money.

THE following case was reserved for the opinion of the Court of Criminal Appeal by the Deputy Recorder of the borough of *Birmingham*.

The prisoner, *William Jarvis*, was tried before me, the Deputy Recorder of the borough of *Birmingham*, at the General Quarter Sessions of the Peace holden for the said borough on the 26th day of *June*, 1855, upon an indictment charging him with having in his possession on the 16th day of *June*, 1855, a number of pieces of false and counterfeit coin, to wit, thirteen pieces of false and counterfeit coin, resembling and apparently intended to resemble and pass for thirteen pieces of the Queen's current silver coin called half-crowns, and fourteen pieces of false and counterfeit coin resembling and apparently intended to resemble and pass for fourteen pieces of the Queen's current silver coin called shillings, knowing the same to be false and counterfeit, and with intent to utter and put off the same.

The prisoner was apprehended at twelve o'clock at night in a lodging-house in *Birmingham* by a policeman who searched him, and found upon him, in different pockets of his dress, four counterfeit crowns, all electroplated, of the same date and the same mould, each crown being wrapped in a separate piece of paper, thirteen counterfeit half-crowns, all electroplated, of the same date and the same mould, each half-crown being wrapped in a separate piece of paper, and fourteen counterfeit shillings, all electroplated, of the

Held, that there was sufficient evidence to go to the jury that the prisoner knew the coin to be counterfeit, and that he intended to utter it.

same date and the same mould, each shilling being wrapped in a separate piece of paper, and four shillings good money. On his apprehension, and at the police station, the prisoner said that they (meaning the counterfeit coin) had been given him, while gambling, and he did not know they were counterfeit.

1855.

JARVIS'S
Case.

Upon these facts it was contended for the prisoner that on the true construction of the Act of Parliament (the 2nd Wm. 4, c. 34, s. 8), under which the indictment was framed, there was no evidence to go to the jury that the prisoner knew the coin to be false or counterfeit, or that he intended to utter and put off the same, and a decision of Mr. Justice *Maule* at the *Warwick* Summer Assizes, 1854, on an indictment charging a like offence under the same statute against the same prisoner, was cited to me and relied on.

I told the jury that on the facts proved before them I thought there was evidence to go to them that the prisoner had the coin in his possession knowing the same to be false and counterfeit, and with intent to utter and put off the same, but that they must be fully satisfied on these points before they could find the prisoner guilty.

The jury found the prisoner guilty of the misdemeanor, and I sentenced him to three years' imprisonment in the gaol at *Birmingham* (as he was well known as a notorious dealer in and putter off of false coin).

I request the opinion of the Court of Criminal Appeal whether the facts above stated justify the conviction of the prisoner in point of law?

This case was considered on the 24th of *November*, 1855, by JERVIS C. J., PARKE B., WIGHTMAN J., CRESSWELL J., and WILLES J.

1855. No Counsel appeared either for the Crown or for the prisoner.

JARVIS'S
Case.

JERVIS C. J.—In this case the prisoner is charged with having counterfeit coin in his possession, knowing it to be counterfeit, and with intent to utter and put it off. The case appears to have been reserved upon some supposed but unreported decision of my brother *Maule*; about this case we know nothing, but it probably differed very widely in its facts from the present. Here, upon the person of the prisoner, are found four crowns of the same date and mould, thirteen half-crowns of the same date and mould, and fourteen shillings of the same date and mould, all counterfeit, and each coin wrapped in a separate piece of paper. It was contended that there was no evidence to go to the jury; but the case was submitted to the jury, and they found that the prisoner knew the coin was counterfeit, and that he intended to utter and put it off; and I entirely concur with the jury.

PARKE B.—In *Rex v. Fuller and Robinson* (*a*), upon an indictment for procuring counterfeit shillings with intent to utter them as good, the evidence was that two parcels were found upon the prisoner containing about twenty shillings each, wrapped up in soft paper to prevent their rubbing against one another; and there was nothing to induce a suspicion that the prisoner had coined them, and on a case reserved the Judges were of opinion that having in possession this coin unaccounted for, and without any circumstances to induce a belief that the prisoner was the maker (*b*), was evidence of procuring with intent to utter.

(*a*) *East. T.* 1816, MS. *Bailey J.*; *Russ. & Ry.* 308.

(*b*) Previously to the 2 *Wm.* 4, c. 34, s. 8, being in possession of

counterfeit coin with intent to utter it, was no offence; *Rex v. Stewart*, *Russ. & Ry.* 288; S. P. *Rex v. Heath*, ib. 184; and though

The supposed decision of my brother *Maule* is quite contrary to this and the other cases cited
1 *Russ. on Crimes*, 48.

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JARVIS'S
Case.

CRESSWELL J.—The case states that the coin was found in different pockets of the prisoner's dress. There was sufficient evidence to warrant the finding of the jury.

WIGHTMAN J. and WILLES J. concurred.

Conviction affirmed.

the procuring counterfeit coin with intent to utter it was an offence, proof that the defendant was the actual coiner was a sufficient an-

swer to a charge of procuring. See per *Thomson C. B., Rex v. Fuller and Robinson*, Russ. & Ry. 308.

82 Twp CC 48

REGINA v. FRANCIS STUBBS.
See 9 Cols 36

1855.

THE following case was stated for the opinion of the Court of Criminal Appeal, by the Chairman of the Quarter Sessions of the Peace for the county of *Durham*.

At a General Quarter Sessions of the Peace for the county of *Durham*, held at *Durham*, on the 2nd day of *July*, 1855, before *Rowland Burdon*, Esq., Chairman; *Francis Stubbs*, *Newton Wardle*, *William Wraithman* and *John Thornton* were indicted for stealing and receiving, knowing it to be stolen, a

The rule that a jury should not convict on the unsupported evidence of an accomplice is a rule of practice only, and not a rule of law. *Semble*, that a Judge should advise the jury to acquit, unless the testimony of the accomplice be corroborated, not only as to the circumstances of the offence, but also as to the participation in it by the accused, and that where there are several prisoners, and the accomplice is not confirmed as to all, the jury should be directed to acquit the prisoners as to whom he is not confirmed; but *held*, that this being a rule of practice only, if a jury choose to act on the unconfirmed testimony of the accomplice, the conviction cannot be quashed as bad in law. *See v. 3 2430*

1855.

STUBBS'S
Case.

quantity of copper or yellow metal, the property of *Edward Bailey*.

The evidence, as far as it went, to implicate *Stubbs*, was as follows :

Ralph Railes, Joseph Robson and John Robson, three accomplices in the robbery, swore to the copper having been taken from the possession of the prosecutor on the nights of *Thursday, Friday and Saturday*, the 24th, 25th and 26th days of *May*, in the year of our Lord, 1855. They swore that *Stubbs* was present at the last of these takings only, and that he assisted in carrying the copper to a place of deposit in the *Hendon Banks*, on *Sunderland Moor*, near the town of *Sunderland*, and that he assisted in carrying some of it from the place aforesaid, and in selling it at one *Storey's*, a marine store dealer in *Sunderland*, and shared in the money that was produced by such sale. *Storey* was called, and swore that *Wardle, Wraithman and Joseph Robson* were the parties who brought the copper to his premises and sold it, and no further evidence was adduced as against *Stubbs*, but the accomplices were corroborated in other particulars in regard to the other prisoners.

At the conclusion of the case for the prosecution, the Counsel for the prisoner *Stubbs*, after calling the attention of the Chairman to several cases, asked him to direct the jury that the evidence of the accomplices in respect of the prisoner *Stubbs* was not corroborated, and that it ought to have been corroborated as to each prisoner individually ; whereas it was only corroborated as to two of the four prisoners, *Stubbs* not being one of the two. After hearing the Counsel for the prosecution, the Chairman directed the jury that it was not necessary that the accomplices should be corroborated as to each individual prisoner being connected with the crime charged ; that their being

corroborated as to material facts tending to show that *Wardle* and *Wraithman* were connected with the robbery was sufficient as to the whole case ; but that the jury should look with more suspicion at the evidence in *Stubbs*' case, where there was no corroboration than in the cases of *Wardle* and *Wraithman*, where there was corroboration, but that it was a question for the jury. The jury found all the prisoners guilty. *Stubbs* was sentenced to twelve months' imprisonment and hard labour.

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STUBBS'S
Case.

The question for the Court of Criminal Appeal is, whether the direction of the Chairman was right ?

R. Burdon, Chairman Quarter Sessions.

This case was considered on the 24th November, 1855, by JERVIS C. J., PARKE B., WIGHTMAN J., CRESSWELL J. and WILLES J.

No Counsel appeared for the prisoner. *W. S. Grey* appeared for the Crown, but was not called upon by the Court.

JERVIS C. J.—We cannot interfere in this case, although we may regret the result that has been arrived at. It is not a rule of law that an accomplice must be confirmed in order to render a conviction valid ; and it is the duty of the Judge to tell the jury that they may, if they please, act on the unconfirmed testimony of an accomplice. It is a rule of practice, and that only, and it is usual in practice for the Judge to advise the jury not to convict on the testimony of an accomplice alone, and juries generally attend to the direction of the Judge, and require confirmation. There is a further point in this case. Where an accomplice speaks as to the guilt of three prisoners, and is confirmed as to two of them only, the jury may, no doubt, if they please, act on the evidence of the accomplice alone as to the third prisoner ; but it

1855. is proper for the Judge in such a case to advise the jury that it is safer to require confirmation of the testimony of the accomplice as to the third prisoner, and not to act upon his evidence alone; for nothing is so easy as for the accomplice, speaking truly as to all the other facts of the case, to put the third man in his own place; but a jury may, if they choose, act on the unconfirmed testimony of an accomplice; in this case they have acted on the evidence before them, and we cannot interfere.

PARKE B.—During the time that I have been upon the bench, now more than a quarter of a century, I have uniformly laid down the rule of practice as it has been stated by the Lord Chief Justice. I have told the jury that it was competent for them to find a prisoner guilty upon the unsupported testimony of an accomplice; but that great caution should be exercised, and I have advised them—and juries have acted on that advice—not to find a prisoner guilty on such testimony unless it was confirmed. There has been a difference of opinion as to what corroboration is requisite; but my practice has always been to direct the jury not to convict unless the evidence of the accomplice be confirmed, not only as to the circumstances of the crime, but also as to the identity of the prisoner. An accomplice necessarily knows all the facts of the case, and his story, when the question of identity is raised, does not receive any support from its consistency with those facts. The Chairman in this case has departed from the usual practice; but the jury having acted upon the evidence the Secretary of State only can interfere.

WIGHTMAN J.—It has not been the uniform practice to require confirmation as to all the prisoners. In some cases it has been held that if there be confirmation of the accomplice as to one of the prisoners, the

jury may convict as to all (a). The rule requiring confirmation is one of discretion and not of strict law.

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STUBBS's
Case.

CRESSWELL J.—I agree in the view of the question taken by my brother PARKE, and have always acted upon it. You may take it for granted that the accomplice was present when the offence was committed, and there may therefore be no difficulty in corroborating him as to the facts; but that has no tendency to show that any particular person who may be accused was there.

WILLES J.—We sit under a statute to decide questions of law, and questions of law only can be reserved for our opinion. This is not a question of law, but of practice.

Conviction affirmed.

(a) His Lordship referred to *R. v. Dawber* and *R. v. Jones* there note (d) 2 Stark. on Ev. 12, and cited.

9 Cop 476-2 Leigh Case 443 + note
Ans 7 & 8 Vict cxxv!
 REGINA v. HENRY SMITH.
867 Cop Cr Cas 57.

1855.

THE following case was stated for the opinion of the Court of Criminal Appeal by Mr. Justice CROMPTON.

The prisoner was convicted before me at the Winchester Summer Assizes, 1855, on an indictment charging him with wounding *William Taylor*, with intent to murder him.

On the night in question the prisoner was posted

The prisoner was convicted on an indictment under 7 & 8 Wm. 4 & 1 Vict. c. 85, s. 3, charging him with wounding A. with intent to murder him. The prisoner,

supposing A. to be B., shot at and wounded A. The jury found that the prisoner intended to murder B., and that he intended to murder the individual he shot at supposing him to be B. Held, that the conviction was right.

1855. as a sentry at *Parkhurst*, and the prosecutor, *Taylor*,
SMITH's
Case. was posted as a sentry at a neighbouring post.

The prisoner intended to murder one *Maloney*, and supposing *Taylor* to be *Maloney*, shot at and wounded *Taylor*.

The jury found that the prisoner intended to murder *Maloney*, not knowing that the party he shot at was *Taylor*, but supposing him to be *Maloney*, and the jury found that he intended to murder the individual he shot at supposing him to be *Maloney*.

I directed sentence of death to be recorded, reserving the question, whether the prisoner could be properly convicted on this state of facts of wounding *Taylor* with intent to murder him ? See *Rex v. Holt* (7 Car. and P. 518). See also *Rex v. Ryan* (2 Moo. & Rob. 213.)

CHARLES CROMPTON.

This case was considered on 24th November, 1855, by JERVIS C. J., PARKE B., WIGHTMAN J., CROMPTON J. and WILLES J.

No Counsel appeared either for the Crown or for the prisoner.

JERVIS C. J.—There is nothing in the objection. The conviction is good.

PARKE B.—The prisoner did not intend to kill the particular person, but he meant to murder the man at whom he shot.

The other learned Judges concurred.

Conviction affirmed.

REGINA v. HUGH JOSEPH SMITH.

1855.

THE following case was stated for the opinion of the Court of Criminal Appeal by Mr. *Russell Gurney* Q. C.

At a General Session of Oyer and Terminer and Gaol Delivery holden for the jurisdiction of the Central Criminal Court on the 28th day of *August*, 1855, *Hugh Joseph Smith* was tried before me upon the indictment hereinafter referred to for stealing ten scrip certificates of a foreign railway company, called *The Great Luxemburg Railway Company*. The first count charged the prisoner with stealing ten securities for money, to wit certificates, each entitling the holder thereof to ten half shares of 10*l.* each in the funds of a certain company, called *The Great Luxemburg Company*. The second count charged him with stealing ten securities for money, to wit, certificates of shares in the funds of *The Great Luxemburg Railway Company*. The third count charged him with stealing ten securities for money and ten pieces of paper.

The theft was proved by satisfactory evidence. The documents themselves were not produced upon the trial, but the annexed was shown to be a facsimile. Evidence was given that, among dealers in railway stocks and shares upon the Stock Exchange in *London*, these documents were treated and dealt with under the name of *Great Luxemburg Railway Shares*, and that they were scrip, entitling the holders thereof to receive dividends, and that they passed by delivery as Bank notes. No evidence however was given of the existence of any fund out of which such dividends

The prisoner was convicted of stealing certificates of a foreign railway company, which certificates it was proved in evidence were treated and dealt with on the *London Stock Exchange* as scrip of a foreign railway. Held, that such certificates are a valuable security within the statute 7 & 8 Geo. 4, c. 29, s. 5, and that the conviction was right.

1855.
SMITH'S
Case.

were payable, or of the payment of any dividends, or of the existence of *The Great Luxemburg Railway Company*. Upon the trial the following objections were made. First, that the documents were not within the provisions of the 5th section of 7 & 8 Geo. 4, c. 29; and, secondly, that although not within the provisions of the said section, they were shown to be valuable securities, and consequently could not be properly described as pieces of paper. I however overruled both the objections, in order that the opinion of the Court for the consideration of Crown Cases should be taken upon the subject, and the jury, under my direction, found the prisoner guilty on all the counts. Entertaining doubts as to the propriety of my ruling, I have to request the decision of the said Court upon these points in the manner above stated, and whether such conviction can be supported on any grounds consistently with the facts hereinbefore stated. Judgment was respited upon the prisoner, and he stands committed to the gaol of *Newgate* to abide the determination of this case.

Russell Gurney.

(*Copy of facsimile above referred to.*)

GRANDE COMPAGNIE DU LUXEMBOURG.

HALF SHARE. (£10).

TITRE DU PORTEUR.
DIX DEMI-ACTIONS.

Le porteur de ce certificat a droit à dix demi-actions de dix livres chacune de la Grande Compagnie du *Luxembourg*, regies par les statuts de la Société Anonyme constituée à *Bruxelles* le 11 *Septembre* 1846, et approuvée par arrêté royal du 1er *Octobre* suivant,

CERTIFICATE TO BEARER.
TEN HALF SHARES.

The holder of this certificate is entitled to ten half shares of 10l. each in the Great *Luxembourg* Company, subject to the statutes of the Société Anonyme passed at *Brussels* the 11th *September* 1846, and sanctioned by royal decree of the 1st *October* 1846, and to all the

et soumises à tous les engagements contractés par la compagnie.

L'intérêt à raison de cinq par cent par an sera payé sur ces demi-actions jusqu'à ce que la ligne soit exploitée de *Bruxelles à Namur*; après quoi les dividendes à répartir proviendront de l'excédant qui restera après le paiement des charges privilégiées.

Entd.

Extrait des Statuts de la Grande Compagnie de Luxembourg.

Art. 10.

Le montant des actions sera acquitté de la manière suivante: Deux-dixièmes seront versés immédiatement, s'ils ne l'ont pas été déjà, par les souscripteurs. Les époques successives des versements ultérieurs seront fixées par le conseil d'administration; un intervalle de trois mois les séparera toujours; chaque versement ne pourra être que d'un dixième au plus.

Art. 11.

Les appels de fonds se feront par avis ou insertions publiés un mois d'avance dans trois des principaux journaux quotidiens de *Bruxelles et de Londres*. Ces avis, insérés deux fois dans le mois qui précédera l'échéance, serviront de mise en demeure suffisante à l'égard de tous les actionnaires.

Art. 12.

Les versements se feront dans les caisses désignées par le conseil d'administration. Il sera fait mention sur chaque titre des versements successivement opérés.

Art. 13.

Tout actionnaire en retard d'ef-

arrangements which have been made by the company.

Interest at the rate of five per cent. per annum will be paid on these half shares until the line is opened from *Brussels to Namur*, after which the dividends will be derived from the surplus which may remain after payment of preferential charges.

Deux des Administrateurs.

Two of the Directors.

Secy.

Extract from the Statutes of the Grand Luxembourg Company.

Art. 10.

The amount of the shares shall be paid in the following manner: Two-tenths shall be paid immediately, if they have not been already, by the subscribers. The successive periods of the further payments will be fixed by the Board of Directors, always with an interval of three months between them; no instalment shall exceed one-tenth.

Art. 11.

The calls shall be made by notice or advertisements published one month previously in three of the principal daily papers of *Brussels and London*. These notices, inserted twice during the month preceding the day of payment, shall be considered sufficient and peremptory on all the shareholders.

Art. 12.

The payments shall be made at the places designated by the Board of Directors, and shall successively be acknowledged on each scrip.

Art. 13.

Every shareholder in arrear for

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fectuer les versements exigibles, sera tenu de bonifier à la société, depuis l'échéance du terme, l'intérêt à raison de 5 p. c. l'an, sur toutes les sommes à verser par lui. Tout actionnaire qui n'aura point satisfait à un appel de fonds dans le mois de l'échéance du terme fixé, pourra être déclaré déchu de ses droits ; ses actions pourront être vendues au gré de l'administration, qui lui en renseignera le prix après déduction des frais. Il sera donné avis aux actionnaires défaillants de cette déchéance à encourir par une double insertion dans trois journaux de *Londres* et de *Bruxelles* quinze jours aux moins avant d'appliquer le résultat.

calls shall be bound to pay to the company interest at the rate of five per cent. per annum on all sums to be paid by him from the maturity of each call. Every shareholder who shall fail to pay a call within the month from its falling due may be declared to have forfeited his rights, and his shares may be sold at the will of the directors, who will account to him for their price after deducting expenses. Notice shall be given to defaulting shareholders of the intended forfeiture by two advertisements in the *London* and *Brussels* newspapers, at least fifteen days previously thereto.

This case was argued on 24th November, 1855, before JERVIS C. J., PARKE B., WIGHTMAN J., CROMPTON J. and WILLES J.

Metcalfe appeared for the prisoner; no Counsel appeared for the Crown.

Metcalfe, for the prisoner. First, the prisoner has committed no offence within the fifth sect. of 7 & 8 Geo. 4, c. 29. The scrip certificates in question are not within the provisions of that section. In the first branch of the section, as to stealing securities for shares in the public stocks or funds, the words "or of any foreign state" are used; and the same words appear in the third branch of the section relating to stealing securities for money. But those words are omitted in the second branch of the section which relates to securities for shares in the funds of any body corporate, company or society, or to any deposit in any savings bank.

JERVIS C. J. The thing done here is within the words and within the mischief of the act.

Metcalfe. The omission to which I have referred

is a strong argument to show that this branch of the section was not intended to extend to securities in the hands of a foreign company.

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The Forgery Act, 1 Wm. 4, c. 66, is an illustration of the rule of construction for which I contend. The 18th section relates to bills of exchange and promissory notes, of *all* bodies corporate or companies carrying on the business of bankers; but it was thought necessary by the very same section to provide specifically for the notes and bills of foreign bodies corporate and foreign companies.

The learned Counsel also referred to 2 Geo. 2, c. 25, 9 Geo. 4, c. 55, s. 5, and to *Rex v. M'Kay* (*a*), and contended, that to satisfy the enactment in sect. 5 of 7 & 8 Geo. 4, c. 29, the instrument must fall strictly within the description specified in it, and that the scrip certificates of a foreign company did not fall within that description.

Secondly, although the scrip certificates are not within the statute, they are nevertheless shown to be valuable securities, and consequently cannot be properly described as pieces of paper : *Reg. v. Powell* (*b*), *Reg. v. Watts* (*c*).

JERVIS C. J.—I think the conviction was right. It is only necessary that the decision of the Court should be expressed upon the first point, and that depends on the answer to the question, whether these scrip certificates are “valuable securities” within the meaning of sect. 5. of 7 & 8 Geo. 4, c. 29? I think that they are. They are clearly within the mischief intended to be prevented by the act, namely, the stealing of valuable property. Then, are the words of the section large enough to include this case? I think they are. The

(*a*) *Russ. & Ry.* 71.

(*b*) *2 Den. C. C.* 403.

(*c*) *Ante*, p. 324. 326

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words in the two branches of the section preceding and following that on which the indictment is founded, as to foreign states, extend the otherwise limited meaning of the expressions, "public stocks, funds and money," and tend to show that the expression "funds of any body corporate, company or society" in the intermediate branch are intended to have the larger construction. I agree that the offence is territorial; but property, when it comes into this country, is under the protection of its laws, and it is quite as much an offence to steal a security for shares in a foreign company as to steal a security for shares in an *English* company. The stealing the scrip in question is, I think, as much within the statute, as the stealing a foreign bill when brought into this country would be.

PARKE B.—My first impression was that the statute did not extend to securities for shares in the funds of a foreign body corporate or foreign company. The words used are, "in the funds of any body corporate, company or society, or to any deposit in any savings bank." It is true there are corporations in foreign countries, but they are not of the same description as our own. The words "company or society" are somewhat of an English character, and "savings banks" are peculiarly so; but though I felt a little doubt about it, I do not mean to dissent from the view entertained by the Court; and no doubt the case is clearly within the mischief intended to be provided against by the statute.

WIGHTMAN J.—I agree entirely in the opinion expressed by the Chief Justice. The introduction of the words "foreign state," wherever public funds or money are referred to, strengthens this view of the statute. Those words are used where there might be ambiguity or difficulty to give an extended operation to the act; and where there can be no ambiguity or

difficulty they are not used. The language of that branch of the section which we are considering, is quite large enough to include the present case.

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CROMPTON J.—My impression is the same, although I am not quite so clear on the point. The statute of *Anne* which makes promissory notes negotiable was, after much consideration, held to apply to foreign notes. The words of this statute are general enough, and upon the whole I think they are sufficiently large to include this case, which is no doubt within the mischief intended to be provided against.

WILLES J. concurred.

Conviction affirmed.

REGINA v. THOMAS LANDS alias WHITE.

1855.

THE following case was stated for the opinion of the Court of Criminal Appeal by Mr. Justice CROMPTON.

The prisoner was convicted before me at the *September Old Bailey Sessions*, 1855, on an indictment containing counts framed on the 253rd section of the Bankrupt Act, 12 & 13 Vict. c. 106. One set of

On an indictment against a bankrupt under sect. 253 of the 12 & 13 Vict. c. 106, for, within three months next preceding the filing of

a petition in bankruptcy, obtaining goods on credit under the false colour and pretence of dealing and carrying on business in the ordinary course of trade, it is necessary for the prosecution to prove, not only the petition to and adjudication by the Court of Bankruptcy, but also the preliminary matters, viz. the petitioning creditor's debt, the trading and the act of bankruptcy. The act of bankruptcy relied upon being the filing of a petition in the Court for Relief of Insolvent Debtors, a copy of the petition, certified as required by sect. 239 of the above statute, was put in evidence, but there was no proof of the date of the filing except the indorsement at the back of the petition. Held, that such indorsement was no evidence of the date of the filing of the petition, and therefore no evidence of the act of bankruptcy.

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counts was framed upon the first branch of the 253rd section, which makes it a misdemeanor "if any bankrupt shall within three months next preceding the filing of the petition for adjudication of bankruptcy, under the false colour and pretence of carrying on business and dealing in the ordinary course of trade, obtain on credit goods, with intent to defraud the owner thereof."

Another set of counts was framed on the second branch of the same section, rendering it a misdemeanor "if any bankrupt shall within such time and with such intent remove, conceal or dispose of any goods so obtained."

In the course of the trial several objections arose, which I reserved for the opinion of the Judges.

The filing the petition for adjudication in bankruptcy and the adjudication of bankruptcy were on the 3rd *April*, 1855.

The first objection was to the sufficiency of the proof of the act of bankruptcy and of the time when it was committed. The act of bankruptcy relied upon was the filing a petition in the Insolvent Court.

The proof offered was a copy of the petition to the Insolvent Court, purporting to be signed by the officer in whose custody the petition was. See 12 & 13 *Vict.* c. 106, s. 239.

The only proof offered as to the time of filing this petition was the indorsement on the back of the paper (amongst other things) of the time of the filing the petition.

The indorsement was as follows:

"No. 65076.

Mr. Commissioner *Murphy*.

First arrest, 15th day of *February*, 1855.

Commitment, 15th day of *February*, 1855.

Petition, dated 22nd day of *February*, 1855.

Petition filed 27th day of *February*, 1855.

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Vesting Order, 28th day of *February*, 1855.

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Copy petition of *Thomas Lands*, Debtors' Prison for
London and Middlesex.

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	1 8	
Certificate	- - -	2 6
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Attorney, *H. R. Silvester.*

Address, 18, *Great Dover Street, Newington.*"

The only signature of the officer was in the inner fold of the paper, which contained as follows:

"In the Court for Relief of Insolvent Debtors.

"I hereby certify the within to be a true copy of the petition of *Thomas Lands.*

"Rich. W. Yeo,

"Deputy to *Henry Simpson*, chief clerk of the said Court, in whose custody such petition now is."

The paper proved in evidence is to be in Court, and may be referred to as part of the case.

The second objection was that by the use of the word bankrupt in the 253rd section, the legislature must be taken to have intended a person who had committed an act of bankruptcy before the obtaining the credit or concealing or removing the goods.

No act of obtaining or removing or concealing after an act of bankruptcy was proved.

The third objection related to the counts for obtaining the goods on credit.

Some of these counts charged the prisoner with obtaining goods the property of *Henry Rokesley*, and other counts charged him with obtaining goods the property of *William Langley*.

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Rokesley proved that the prisoner came to him in *Northamptonshire* and gave an unlimited order, on which he supplied him with goods to the amount of 160*l.* 5*s.* in about two days after the 14th *December*.

When the prisoner accepted a bill drawn upon him for the first lot, about the 28th *December*, he sent another order, and the goods so ordered were dispatched on the 4th *January*, 1855.

Rokesley was a shoe manufacturer in *Northamptonshire*, and sent the goods from that county to the prisoner in *London*.

William Langley was also a shoe manufacturer in *Northamptonshire*. The prisoner ordered from him on the 28th or 29th *November*, 1854, goods for shipping and for shop trade. And in pursuance of that order goods were sent from *Northamptonshire* to the defendant in *London*, on the 1st, 4th, 18th, 22nd and 26th *December*, 1854, and on the 1st, 8th and 15th *January*, 1855.

There was no evidence of any order or request to send any of the goods within the three months next before the adjudication of bankruptcy, and it was contended that the merely receiving the goods within that time, in consequence of prior orders, did not constitute the offence of obtaining within the meaning of the statute.

The last objection related to the counts for removing and concealing goods within the three months. There was evidence of removing and concealing within the three months some of the goods ordered before the three months and received by the prisoner after the commencement of the three months. It was contended that the removing and the concealing within the three months goods which had been ordered before the three months, and had been sent in pursuance of such order within the three months, did not constitute the offence.

of removing or concealing under this branch of the statute ; and that the enactment referred only to cases of removing or concealing goods which had been obtained at such time and in such manner and with such intent as to fall within the former branch of the section against obtaining goods on credit.

I respited judgment and the prisoner remains in custody.

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CHARLES CROMPTON.

This case was argued on 24th November, 1855, before JERVIS C. J., PARKE B., WIGHTMAN J., CROMPTON J. and WILLES J.

G. Francis (*O'Brien* with him) appeared for the Crown, and *Ballantine* (*Parry* with him) for the prisoner.

Ballantine, for the prisoner. The first objection, though technical, is important.

The indictment alleged, and the prosecutor was bound to prove, the petition to the Court for Relief of Insolvent Debtors, and all the other elements of the bankruptcy. It is not sufficient to rely on the adjudication of bankruptcy alone. The word "bankrupt," in sect. 253, means a person duly adjudicated a bankrupt, and it is therefore necessary to prove the trading, the petitioning creditor's debt, and the act of bankruptcy; *Rex v. Jones* (a).

PARKE B.—In sect. 252 the words are, "If any bankrupt shall, after an act of bankruptcy committed, or in contemplation of bankruptcy," &c. The word "bankrupt" there seems to mean a person actually bankrupt; but in sect. 253 there are no qualifying words, and the word "bankrupt" in that section seems to be used in its strict sense.

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Ballantine. Here it was not shown that the defendant was duly adjudged a bankrupt, as there was no evidence of the act of bankruptcy. The act of bankruptcy relied on was the applying by petition to the Court for Relief of Insolvent Debtors, which is by sect. 74 of 12 & 13 Vict. c. 106 (*a*) to be deemed an act of bankruptcy from the time of filing such petition.

It was necessary, therefore, to show the time when the petition was filed, and of this there was in fact no evidence. The only evidence was a copy of the petition itself, certified as required by sect. 239 of 12 & 13 Vict. c. 106 (*b*).

PARKE B.—Section 233 makes the advertisement in the *Gazette* conclusive evidence of the bankruptcy; but here the question of the conclusiveness of such proof of the adjudication does not arise, for the *Gazette* was not given in evidence.

Ballantine. Section 233 does not extend to criminal cases, and if it did the *Gazette* was not put in. For anything that appears the petition might have been filed after the adjudication in bankruptcy. It is true that on the indorsement on the back of the

(*a*) The section enacts, "that the filing of a petition in the Court for the Relief of Insolvent Debtors in *England* by any such trader who shall be in actual custody, for his discharge from custody, and who shall apply by petition to such Court for his discharge from custody according to the laws for the relief of insolvent debtors in *England*, shall be deemed to be an act of bankruptcy from the time of filing such petition."

(*c*) That section enacts, "that a copy of any petition filed in the Court for the Relief of Insolvent Debtors in *England*, &c., and of

any vesting order, schedule, order of adjudication, and other orders and proceedings purporting to be signed by the officer in whose custody the same shall be, or his deputy, certifying the same to be a true copy of such petition, vesting order, schedule, order of adjudication, or other orders or proceedings, and appearing to be sealed with the seal of such Court, shall at all times be admitted under this act as sufficient evidence of the same, and of such proceedings respectively having taken place without any other proof whatever given of the same."

petition a day is named as the day on which the petition was filed; but that indorsement is not evidence, although the copy of the petition itself duly certified is. There was no evidence of that except this indorsement, to the correctness of which the officer of the Court does not profess to certify; and if he had certified, the indorsement is no part of the petition, and the certificate would not have made it admissible by virtue of the statute (a).

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G. Francis, for the Crown. First, it is not now necessary to prove the petitioning creditor's debt, the trading or the act of bankruptcy. Evidence of the adjudication is sufficient. *Rex v. Jones* was decided upon 6 Geo. 4, c. 16, s. 112, and is not applicable to the present statute. The section on the construction of which the decision in *Rex v. Jones* was founded enacts, "that if any person against whom any commission has been issued, or shall hereafter be issued, whereupon such person hath been or shall be declared bankrupt, shall" &c. The words in section 253 of the present statute are simply "any bankrupt." Under the 6 Geo. 4, c. 16, the Court of Bankruptcy had no primary jurisdiction, and had no jurisdiction to adjudicate unless the commission had duly issued. But now the Court of Bankruptcy is a Court of record; proceedings in it are instituted by petition, and this Court will presume *omnia rite acta* in favour of its decision; *Reg v. Hilton* (b).

PARKE B.—Section 253 does not say "if any person" shall fraudulently obtain goods on credit, but "if any bankrupt."

Francis. The word bankrupt, in that section, means any person adjudged a bankrupt; it is so used

(a) As the judgment of the Court proceeded on this point alone, the arguments of Counsel on the other objections are omitted.

(b) 2 Cox C. C. 318.

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in sections 252 and 255, and such has been the construction put upon the word in 6 *Geo. 4*, c. 16, s. 84; *Cannan v. The South Eastern Railway Company* (*a*), *Norton v. Walker* (*b*).

Secondly. There was sufficient evidence of the date of the filing of the petition. The certificate of the officer of the Court shows that the petition had been filed, because it is filed when it reaches its place of custody. The petition is subscribed on the 22nd *February*, and the adjudication in bankruptcy was on the 3rd *April*; and the filing therefore must have been between those dates, and consequently within two months of the adjudication. Section 74 of 12 & 13 *Vict.* c. 106 makes the filing of the petition an act of bankruptcy in the event of the adjudication in bankruptcy following within two months of such filing. It was therefore only necessary to show that the adjudication in this case was within two months, and that was conclusively proved by the date of the petition itself, coupled with the date of the certificate and the date of the adjudication.

Thirdly. If the indorsement were necessary, the petition being certified, that certificate made the indorsement evidence of the date of filing; *Jones v. Nicholls* (*c*).

JERVIS C. J.—In that case the order was part of the instrument to which it was annexed.

JERVIS C. J.—It seems to me that the objection Mr. *Ballantine* first presented to us must prevail. Section 239 of the statute makes the certified copy of the petition admissible in evidence, but there is no evidence to show when it was filed, and consequently no evidence of the act of bankruptcy or when it was committed. The indorsement at the back of

(*a*) 7 Exch. Rep. 843.

(*b*) 7 Exch. Rep. 480.

(*c*) 3 Moore & Payne, 12.

the petition is no part of the petition itself, and is not made evidence by the statute. Then, was it necessary to prove the act of bankruptcy? I think that according to *Rex v. Jones*, it was necessary for the prosecutors to prove all the ingredients of the bankruptcy. They have not done so, and the conviction must be quashed.

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PARKE B.—I am entirely of the same opinion.

The other learned Judges concurred.

Conviction quashed.

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REGINA, on the Prosecution of The Justices of 1855.
BEDFORDSHIRE, *v.* ABRAHAM ARMAN.

THE following case was stated for the opinion of the Court of Criminal Appeal by the Recorder of Bedford.

At the Quarter Sessions for the borough of *Bedford*, holden on the 29th day of *June*, 1855, before the Recorder, *Abraham Arman* was indicted for embezzling the several sums of seven shillings, one penny, sixteen shillings, seven pence, and ten shillings, the monies of the said justices.

The prisoner was convicted on an indictment charging him with embezzlement. It appeared in evidence that he was store-keeper and clerk at a county gaol, and that it was no part

of his duty (which was defined by written instructions) to receive money; but that he had from time to time received moneys in the absence of the governor of the gaol, and to the knowledge of some of the justices. It was submitted on the part of the prisoner, that he had not received the money by virtue of his employment, and that that question ought to be left to the jury; but the Recorder directed the jury, that if they believed that the prisoner received the money, he did receive it by virtue of his employment. Held, that the question whether the prisoner received the money by virtue of his employment ought to have been left to the jury, and that the conviction was wrong.

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The prisoner was employed in the service of the prosecutors, under *Robert Evans Roberts* the governor of the county gaol, as storekeeper and clerk of the prison, and on his appointment written instructions, of which a copy is annexed, were delivered to him.

The prisoner was from time to time informed by the trades instructor of the sale of goods manufactured in the prison, and it was his duty to enter an account of these in the day book, and to make out bills of parcels and receipts for the purchasers.

The governor usually received the payments made by customers for such goods, but sometimes in his absence the prisoner received them, and when he did so the course of business was, that he should on the same day enter the receipt thereof in the day book, and should hand over to the governor the amount so received. It was proved also by two of the prosecutors that they had themselves made payments to the prisoner for goods manufactured in the gaol, and that it was in their knowledge that he received monies from customers for goods so manufactured.

It was objected by the Counsel for the prisoner, that he had not received the monies by virtue of his employment, and that it was a question for the jury to decide whether he had so received them or not.

The Recorder told the jury that under these circumstances, if they were satisfied that the prisoner had received the monies, he was of opinion that he received them by virtue of his employment. The jury having found that he did so receive them, the Recorder told them that the only question then left was, whether he embezzled them.

The jury found the prisoner guilty, whereupon judgment was postponed, and the prisoner was discharged on bail, to appear at the next *Epiphany* Sessions for the borough.

The opinion of the Judges is asked: Whether the Recorder ought not to have left it to the jury to say whether or not the prisoner had received the monies by virtue of his employment?

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The following is a copy of the instructions delivered to the prisoner on his appointment, as stated in the case:

Instructions to Storekeeper and Clerk.

To enter upon his duties at unlocking time in the morning, to superintend the cleaning of the offices, and to consider himself responsible for every thing therein. He is not to allow subordinate officers to interfere nor meddle with any of the books, nor must he permit them to congregate nor gossip in the office.

[Meals, &c.] He must go to breakfast at 7.45, return at 8.30 A.M.; dinner at 12, return at 1 P.M., except on *Tuesdays* (V. J. Meetings); in those days, if the meetings are not over before 1 o'clock, his dinner must be brought to the prison.

[Duties.] He will take his turn at the front gates in night duty, in common with the gate and assistant porter, except the week preceding and during the Assizes and Sessions, and at other times, should the governor require his service. When not on night duty, his duties will cease at 7 P.M.; when on night duty the same time allowed him for tea as to the other officers. He will have a *Sunday* off duty in common with the other officers.

[Office.] To check the daily state book daily; to take the utmost care of the commitments and other documents in the office; to endorse and deposit them in their proper place; to post the provision books and prison registers up every day; to collect the invoices for the weekly meeting on *Tuesday*; the requisition list to be prepared; the accounts from the various cash books to be prepared and laid before the governor for

1855. signature every *Monday* evening; the stock book to be regularly posted up.

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[Stores.] The storekeeper alone will be held responsible to the governor for the safe keeping and proper distribution of the stores in his charge, to enter all articles received and issued in the books supplied for that purpose, stating from whom received and to what department of the prison issued. He must also see that the articles supplied are according to sample; any departure therefrom he must at once communicate to the governor.

The general issue of stores for the ensuing week to be issued every *Friday* evening at four o'clock, and only those articles are to be issued as are applied for and entered in the requisition book, which the storekeeper will lay before the governor for his inspection.

[Prisoners.] Names to be entered in "Register," "Description book," "Sentence book" and "Diary;" if a fine, in "Fine book;" also the commitments laid before governor every evening, endorsed with the usual particulars. Every *Friday* make out list of discharge prisoners for the ensuing week. Borough prisoners to be entered in "Borough prisoners' book." Punishments by governor to be entered every week for V. J. meetings.

[Government Convicts.] Prepare weekly return of convicts every *Saturday*; also "Monthly return," 1st of every month to be forwarded to Director of Convict Prisons.

Sessions.

[Manufactory.] The outstanding accounts to be made and sent out previous to every Quarter Sessions.

[Bills.] Forms to be sent to parties supplying goods previous to each Sessions.

[Sessions.] Black List for Assize and Sessions Calendars to be prepared for ditto in the usual form.

[Stationery.] Check off all articles supplied as 1855.
stated in the contract for stationery.

Robt. E. Roberts,

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Case.

Governor.

13th February, 1854.

This case was argued on 24th November, 1855, before JERVIS C. J., PARKE B., WIGHTMAN J., CRESSWELL J. and WILLES J.

Pearse appeared for the Crown and *Tozer* for the prisoner.

Tozer, for the prisoner. The written instructions defined the duties of the prisoner. He was not a regular servant; his duties were statutable, and the instructions which defined them were approved by the Secretary of State pursuant to 4 Geo. 4, c. 64; it therefore cannot be said that he received the money by virtue of his employment.

JERVIS C. J.—But it does not seem to be disputed that he was in fact sometimes employed to receive money. If he was *de facto* employed to receive money, it does not matter whether the instructions defined the employment or not.

Tozer. All that was admitted was the receipt of the money, and the Chairman was requested to ask the jury whether it was received by virtue of the employment, instead of which he told them that in point of law it was so received.

Pearse, for the Crown. The meaning of the Chairman's direction is, that if the jury believed the evidence of the practice, that would justify them in finding that the money was received by virtue of the employment, and therefore in substance the question was left to the jury.

JERVIS C. J.—The case does not so state it. The Chairman ought to have asked the question whether

1855. the money was received by virtue of the employment ; but it appears quite clearly that he did not.

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PARKE B.—He should have explained to the jury that there might have been an employment by the justices independent of the statutory regulations, and then asked them whether there was in fact such an employment, and whether the money was received by virtue of it.

The other learned Judges concurred.

Conviction quashed.

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387.

1855. REGINA v. WILLIAM DIXON and MARY ANN LEE.

The prisoner was convicted upon an indictment for stealing a purse containing seven 5*l.* notes and other money. It was found by the jury that the purse and its contents were lost by the prosecutor and

THE following case was stated for the opinion of the Court of Criminal Appeal by the Recorder of Leeds.

The prisoners were indicted for felony at the *Leeds* Borough Sessions, holden before the Recorder of that borough on the 23rd day of *October* in the year of our Lord 1855. The indictment contained three counts. The first count charged the prisoners with feloniously stealing from the person of *John Grimshaw* money to the amount and value of thirty-eight pounds found by the prisoner. There was no evidence that the notes had any name or other mark upon them indicating to whom they belonged, nor was there evidence of any other circumstances which would disclose to the prisoner, at the time when he found the property, the means of discovering the owner ; but the jury being asked whether, at or after the time of finding the purse and its contents, the prisoner believed that there was a reasonable probability that the owner could be found, answered that he did believe that the owner could be traced. *Held*, that the prisoner was not properly convicted.

ten shillings, and one cotton purse of the value of one shilling, of the goods, monies and chattels of the said *John Grimshaw*. The second count charged them with feloniously stealing money and purse (described as before). The third count charged them with feloniously receiving money and purse (described as before), then lately before feloniously stolen, knowing them to have been feloniously stolen.

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Both prisoners pleaded not guilty to all the counts; and issue was joined on the part of the Crown.

The case was tried at the said Sessions before the said Recorder and a jury. No evidence was given sufficient to support any of the charges against *Mary Ann Lee*.

As to *William Dixon*, the following facts were proved. *John Grimshaw*, about four in the afternoon of the fourth day of *September* last, being then in the town of *Leeds*, placed in a black purse seven five-pound notes, three sovereigns and three shillings; he at that time put this purse in an inside pocket of a waistcoat which he then had on. He did not see either the purse or the money again before he discovered, as after mentioned, that he had lost them. About eight o'clock in the same afternoon he quitted a public-house where he had been drinking, and at that time he felt his purse in the pocket in which he had placed it. He was then not sober. He afterwards left *Leeds* by a railway train, which arrived at *Bradford* soon after ten o'clock that afternoon, and on his arrival there he found that he had not the purse or the money. He returned to *Leeds* early on the next morning and communicated the facts to the police. About eleven o'clock on the afternoon of the same fourth day of *September* last, *William Dixon* was seen in possession of two of the five-pound notes which had been placed in the purse by *John Grimshaw*. *William Dixon* changed

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Case.

one of these two notes, and endeavoured to change the other, but was not able to do so. On the next morning, between seven and eight o'clock, *William Dixon* attempted to change one of the notes that had been placed in the purse by *John Grimshaw*. A policeman, under the belief that this was a forged note, asked *William Dixon* where he had got that note and the note which he had changed on the preceding night. *William Dixon* answered that he had found both last night in the *Croft*. The *Croft* is an open area in a much frequented part of *Leeds*; and there was full time for *John Grimshaw* to have been in the *Croft* between the time of his leaving the public-house and his coming to the railway station at *Leeds* on the said preceding night.

The Counsel for *William Dixon* urged to the jury that the story told by *William Dixon* was probably true, and that *John Grimshaw* had probably lost the purse and money in the *Croft*. It was not disputed that *William Dixon*, if he found the money, intended at and always from the time of finding it to appropriate it. But the Counsel contended that, on this supposition, *William Dixon* was entitled to an acquittal on all the counts.

The jury stated that they were of opinion that the purse and money were not stolen from *John Grimshaw's* person, but lost by him, and found by *William Dixon*.

The Recorder then desired them to consider four questions, namely:

First. Whether *John Grimshaw* had intentionally abandoned his right to the money?

Secondly. Whether *William Dixon*, at or after the time of his finding the money, believed that the owner had abandoned his right to the money?

Thirdly, Whether there was or was not reasonable

probability, at and from the time of the finding, that the owner could be traced ?

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Fourthly. Whether at or after the time of the finding, *William Dixon* believed that there was not reasonable probability that the owner could be traced ?

The jury answered the first two questions in the negative and the third in the affirmative ; and, as to the fourth, they said that they were of opinion that *William Dixon* did believe that the owner could be traced. The Recorder then, at the request of the Counsel for *William Dixon*, put three more questions to the jury, namely :

First. Did the owner know where to find the money ?

Secondly. Had *William Dixon* reason to know to whom the money belonged ?

Thirdly. Did *William Dixon* reasonably believe that the owner knew where to find it ?

The jury answered all the last mentioned three questions in the negative.

The opinion of the Recorder upon all the questions of fact coincided with that of the jury, and he told the jury that upon their view of the facts *William Dixon* was guilty of the offence charged in the second count. The jury found that *Mary Ann Lee* was not guilty of any of the offences charged in the indictment, and that *William Dixon* was guilty of the offence charged in the second count, and not guilty of any other offence charged in the indictment.

The Recorder sentenced *William Dixon* to be imprisoned and kept to hard labour in the *Leeds Borough House of Correction* for the space of five calendar months, but respite the execution of the judgment. *William Dixon*, not being able to give bail, was committed to the said house of correction until

1855. the question hereafter mentioned should have been considered. He is still confined in the said house of correction. The question for the opinion of the Justices of either bench and the Barons of the Exchequer is, whether the prisoner ought to have been so convicted as aforesaid under the circumstances above mentioned ?

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T. F. Ellis,

Recorder of the said borough of *Leeds*.

This case was argued on 24th November, 1855, before JERVIS C. J., PARKE B., CRESSWELL J., WIGHTMAN J. and WILLES J.

Pickering Q. C. appeared for the Crown ; no Counsel appeared for the prisoner.

Pickering Q. C., for the Crown. A person finding lost property is not entitled to convert it to his own use without using means to find the owner. There may be an ambiguity in the fourth question, which is whether at or after the time of the finding the prisoner believed that there was not reasonable probability that the owner could be traced ? This case is distinguishable from *Regina v. Thurburn* (a).

PARKE B.—*Traced* is an ambiguous word. The notes were lost, and the prisoner took possession of them and kept them. If the prisoner had seen them drop from the prosecutor, or if the notes had had the owner's name upon them, or there had been any marks which enabled the prisoner to know at the moment when he found the notes who the owner was, or that he could be discovered, it might have been within the principles laid down in *Regina v. Thurburn* (a).

Pickering. It is found by the jury that the prisoner believed that he could have traced the owner.

CRESSWELL J.—Not that at the time of finding he so believed.

JERVIS C. J.—The finding of the jury is that the notes were lost, that the prisoner did not know the owner, but that it was probable that he could have traced him. He was not bound to do that.

PICKERING. There must be proper endeavours to find the owner. *Regina v. West* (a).

PARKE B.—In *Regina v. West* all the Court decided was, that the property was not lost property.

PICKERING. In substance the jury find that both at and after the finding of the jury the prisoner believed he could trace the owner. The Court will not assume that the only facts proved at the trial are those stated in the case.

PARKE B.—The question is, whether you can support the conviction upon any facts after the finding of the jury.

JERVIS C. J.—It does seem to me that it was left to the jury to speculate upon what was in the mind of the man, without any facts to support their speculation. The finding does not raise the point, and the conviction must be quashed.

PARKE B.—The fourth question is not so answered as to raise the point.

The other learned Judges concurred.

Conviction quashed.

(a) *Ante*, p. 402.

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REGINA v. COSMO W. GORDON.

The defendant (one of two bankrupts and partners) was indicted

under 12 & 13 Vict. c. 106, s. 251, for not surrendering. Upon the evidence it appeared, and the jury found, that the bankrupts both left this kingdom before any proceedings in bankruptcy had been taken against them, believing that they should be made bankrupts, and that they staid abroad with the intent to defraud their creditors by depriving them of their right to examine the bankrupts, and to make them responsible.

On the trial, the proceedings in bankruptcy were put in, and it appeared that there were erasures and interlineations in the affidavit verifying the petition for adjudication. *Held*, that the presumption of law was, that the affidavit was in the same state as when it was sworn ; as to alter it after it was sworn would be an act of fraud and misconduct which would not be presumed.

The petition in bankruptcy was allotted by ballot to Commissioner G., but the subsequent proceedings were either before Commissioner H. or Commissioner F. *Held*, that they were not invalid on that account.

The duplicate adjudication was, after the bankrupts had left the kingdom, left at their last usual place of business, and on the same day the property of the bankrupts was removed therefrom, and the place locked up by the messenger of the Court of Bankruptcy ; but the notice was left on the premises, and seen there two or three weeks afterwards. Subsequently the summons to surrender was left at the same place, which was unlocked for the purpose and then locked up again ; before the trial the place was searched, and neither adjudication nor notice was found ; but notice to produce them was served on the prisoner forty-eight hours before the trial. *Held*, that the duplicates of those documents were admissible in evidence.

In the adjudication, and other proceedings previously to the advertisement in the *Gazette*, the bankrupts were described as of *M. Lane* and *C. Lane*, in the city of *London*, colonial brokers, and of *W. Lane*, in the county of *Middlesex*, distillers. In the advertisement in the *Gazette* the description was the same, except that *W. Lane* was said to be in the county of *Essex*. *Held*, that the notice in the *Gazette* was not insufficient on this account.

The bankrupts did not surrender. The summons or notice to surrender was issued by Commissioner H., the proceedings having as before stated been allotted to Commissioner G. *Held*, that this was no valid objection to the summons.

The notice was to appear on one of two days, the first of which had expired before the summons was served. *Held*, that this was sufficient service, as the last of the two days was the day limited according to the statute for the surrender.

The notice was to surrender before Commissioner G., but on the day limited for the surrender Commissioner G. did not sit, but Commissioner F. did. *Held*, that this formed no ground of objection, as one Commissioner could legally sit and act for another.

There was no evidence that the prisoner had actual knowledge of the adjudication and notice to surrender ; but the jury found that he went abroad with the belief before stated, and stayed abroad with the intent before stated. *Held*, that knowledge was not required by the statute, and that if the notice to surrender was duly served, this objection could not prevail.

This being a joint fiat against the prisoner and his partner, and only one duplicate adjudication and one duplicate notice to surrender having been served at the last place of business of the bankrupts : *Held*, by a majority of the Judges, that this service was insufficient ; that a separate notice to surrender ought to have been left for each of the bankrupts ; and that the conviction must therefore be quashed.

in not surrendering as a bankrupt pursuant to 12 & 13
Vict. c. 106, s. 251.

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The first count, after stating the bankruptcy in detail of *Davidson* and *Gordon*, alleged that a duplicate of the adjudication was served upon *Davidson* and *Gordon*, by leaving the same at their usual and last known place of business. That on the 30th *June* the Court caused notice of the adjudication to be advertised in the *Gazette*, and appointed two public sittings for the bankrupts to surrender, namely the 7th *July* and 19th *August*. That the 19th day of *August* thereby became the day allowed to the bankrupts for finishing their examination. That on the 26th *July* notice in writing of the adjudication, and of the said sittings, and of the day limited for such surrender, and allowed for finishing such examination, was left at the usual and last known place of business. And that on the said 19th of *August* the prisoner did not surrender.

The 2nd count was the same, except that prisoner is charged with not attending to finish his last examination on the day of surrender, namely 19th *August*.

The 3rd count recites the proceedings in bankruptcy as before, and charges that prisoner did not surrender to the Court of Bankruptcy in *London*, although the Court of Bankruptcy held a sitting for receiving such surrender.

Fourth count, after reciting proceedings in bankruptcy, and that the 19th day of *August* was the day limited for their surrender to the Court of Bankruptcy, and that twelve at noon of that day was the day and hour allowed by the said Court for finishing their last examination, charges that prisoner on the said day so limited, &c., after notice given in the *Gazette* of the said adjudication of the said time being limited for the said surrender did not surrender himself to the said Court of Bankruptcy at any time on the said day.

1855. The prisoner was properly convicted, unless one of the following objections should be found valid :—

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1. Upon the evidence it appeared that the bankrupts left this kingdom on the 17th of *June*, believing that they should be made bankrupts, and that they stayed abroad with the intent to defraud their creditors, by depriving them of their right to examine the bankrupts and to make them responsible, and the jury must be taken to have found that this was so.

The papers requisite to prove the bankruptcy were produced.

On the petition there was an alteration in the description of *Westham Lane*, the place of the distillery of the bankrupts, from *Middlesex* to *Essex*.

On the depositions to support it there was the same alteration, and also the name of *Davidson* was interlined.

On the adjudication there are alterations from *Middlesex* to *Essex*, from 20th to 21st *June*, from the name of *Holroyd* to the name of *Fonblanque*, as Commissioners.

But all these papers were produced, sealed with the seal of the Registrar of the Bankruptcy Court; some of the alterations were attested by the initials of the Registrar, and there was evidence given in the course of the trial, after they had been read in evidence, which satisfied me that all the alterations were made while the papers were in the course of formation and before they were used as complete.

The objection was that these papers were not admissible in evidence, and if admitted, were invalid by reason of the alterations.

2. Upon the petition it appeared that it was assigned by ballot to Mr. Commissioner *Goulburn*.

But the subsequent proceedings were either before Mr. Commissioner *Holroyd* or Mr. Commissioner *Fonblanque*.

The objection was that they were invalid on that account.

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3. The duplicate adjudication was left at the counting-house in *Mincing Lane*, being the usual and last known place of business of the bankrupts, on the 21st of *June*; all the papers and property of the bankrupts were removed therefrom and the place was locked up on behalf of the assignees on the same day; but this paper was left and seen there a fortnight or three weeks after this removal. On the 26th *July* the summons to appear was left at the same counting-house, which was unlocked for the purpose and then locked up again. Before the trial the counting-house was searched and neither of these papers was found. Notice to produce these papers was served on the prisoner in prison, and the service must be taken to be forty-eight hours before the trial began. I admitted the duplicate originals of these papers to be read, on the ground that no notice to produce was necessary, and if it was that the search for the originals and the notice to produce were sufficient.

The objection was that these documents were not admissible in evidence.

4. The *Gazette* stated that a petition for adjudication in bankruptcy had been filed against *Daniel Mitchell Davidson* and *Cosmo William Gordon*, of *Mincing Lane*, and *Cousins Lane, Upper Thames Street*, in the city of *London*, Colonial brokers and metal agents, and of *Westham Lane*, in the county of *Middlesex*, distillers, dealers and chapmen, and that they having been declared bankrupts, were thereby required to surrender themselves to *Edward Goulburn Esq.*, one of her Majesty's Commissioners of the Court of Bankruptcy, on the 7th day of *July* next, at eleven in the forenoon, and on the 19th day of *August*, at twelve at noon, at the Court of Bankruptcy in *Basinghall Street*, in

1855. the city of *London*, and make a full discovery, &c.
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Case. The former proceedings had described them in the same manner, except that *Westham Lane* was in them said to be in *Essex* and not in *Middlesex*.

The objection was that the notice in the *Gazette* was insufficient on this account.

5. The *Gazette* required the surrender on two days as before stated.

The summons, after reciting a petition and an adjudication, stated that *E. Holroyd*, Commissioner, summoned the bankrupts personally to be and appear before *Edward Goulburn*, Sergeant-at-Law, at the Court of Bankruptcy in *Basinghall Street*, in the city of *London*, on the 7th day of *July*, 1854, at eleven, and on the 19th day of *August*, 1854, at twelve at noon, the last day named being the day limited for their surrender under the said petition, and they were there and then to be examined, &c. This summons was not served by leaving it at the counting-house in *Mincing Lane* till the 27th of *July*.

The objection was that this service was insufficient, being after the 7th of *July*, one of the days appointed for surrendering, and also the Commissioner, *Holroyd*, had no authority to issue the summons, and that therefore there was, in effect, no summons, and, therefore, no felony.

6. The memorandum that the bankrupts did not surrender on the 19th of *August*, stated that Mr. Commissioner *Fonblanque* sat as Commissioner, and that they did not surrender; the objection was that as Mr. Commissioner *Goulburn* did not appear to have sat, the offence was not committed.

7. It appears that only one duplicate adjudication in bankruptcy, and only one duplicate summons to surrender was served, and the objection was that this was insufficient, there being a joint adjudication against two bankrupts.

8. There was no evidence that the prisoner had actual knowledge of the adjudication and summons to surrender. But the jury must be taken to have found that he went abroad with the belief before stated, and stayed abroad with the intent before stated.

The objection was, that the absence of evidence of actual knowledge of the contents of those documents or of the bankruptcy rendered the evidence insufficient to support a conviction.

If the evidence is thought to be insufficiently stated, it is to be sent back for a further statement : the original documents in bankruptcy will be in Court for reference if necessary.

I reserved these objections for the opinion of the Court of Appeal. If either is found to be valid and to defeat the conviction, a verdict of not guilty is to be entered. Otherwise the conviction to remain.

W. ERLE.

This case was argued on the 10th November, 1855, before JERVIS C. J., PARKE B., ERLE J., CROMPTON J. and WILLES J.

Ballantine (with him *Poland*) appeared for the Crown. *M. Chambers Q. C.* (with him *Parry*) for the prisoner.

Montague Chambers, for the prisoner.

First. There were such alterations in the papers necessary to prove the bankruptcy as made them inadmissible. In the petition, *West Ham Lane*, originally alleged to be in *Middlesex*, was altered and described to be in *Essex*, and there was the same objection to the deposition verifying the petition.

JERVIS C. J.—My brother *Erle* has found, that the alterations were made whilst the papers were in the course of formation. The general rule is, that wherever it is an offence to make an alteration in a docu-

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1855. ment, it is to be presumed that it was made so as not to constitute an offence. There is an exception as to wills.

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PARKE B.—The presumption is that the alteration was made before the instrument was used.

M. Chambers. It is true that the case finds, that these alterations were made before the documents were used as completed ; but it does not find that the alteration in the deposition was made before it was sworn.

Secondly. The allotment of petitions is provided for by section 94 of the statute ; and when an allotment to a particular Commissioner has taken place, all the proceedings on that petition must be taken before him, unless the Lord Chancellor orders otherwise. Section 10 provides that the Commissioners shall sit day by day ; and section 12, that the Court shall have a primary, but limited jurisdiction.

JERVIS C. J.—Section 6 makes every Commissioner a Court.

M. Chambers. That is only for the purpose of dispensing with the attendance of all the Commissioners in each case. I contend, that as soon as the petition was allotted to Commissioner *Goulburn*, he became the Court which alone had cognizance of the bankruptcy.

Thirdly. The evidence of the duplicate adjudication and summons having come to the knowledge of the bankrupt was insufficient, and the duplicate originals ought not to have been received in evidence. Those documents were served at the place of business, after it had been placed in the custody of the messenger. The duplicate original of the summons was admitted on the ground that it was a notice, and that a notice to produce a notice is unnecessary ; but that proposition is not universally true ; *Robinson v. Brown*

and another (a). Though treated as a notice by section 251, it is in fact a summons, and is headed as one (b). It is not shown that the documents ever in fact got into the possession of the bankrupt.

PARKE B.—The notice was not found where it was left, and the presumption of fact is, that as it only concerned the bankrupts the person who found it would give it to them, and not that it was stolen ; the use of the notice to produce was to shut out the presumption that it was given back.

M. Chambers. There was no sufficient search at the counting-house ; and no enquiry for the missing papers was made among the servants who cleaned out the place.

Fourthly. The notice of the adjudication in the *Gazette* was insufficient. The description of the bankrupt in the notice should be the same as in the previous proceedings, but there is a substantial difference. In the previous proceedings the bankrupts are described as of *West Ham Lane, Essex*, and in the *Gazette* they are described as of *West Ham Lane, Middlesex*. When the misdescription has been of a slighter character the commission has frequently been superseded. *Ex parte Beckwith et al.* (c). *Ex parte Marsden* (d).

PARKE B.—There is no proof that there was no *West Ham Lane, Middlesex*.

JERVIS C. J.—How would it have been if the vice had been in the fiat? Until superseded it would have been good. An application to supersede for a misdescription is very different from the present proceeding.

M. Chambers. The misdescription is substantial. In *Ex parte Beckwith* it is said that a description which tends to create doubt and confusion in the mind of the

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(a) 3 C. B. 54.

(b) See the notice, *post*, p. 602, n. (a).

(c) 1 Glyn & Jameson, 20.

(d) Cited 2 Madd. 13, n. (a)

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bankrupt cannot be treated as surplusage; here the advertisement was of an adjudication of bankruptcy against persons carrying on business at a place where the bankrupts did not carry on business; surely this is a misdescription tending to create doubt and confusion.

Fifthly. The first part of the fifth objection has been anticipated in the second. The bankrupts were summoned by Commissioner *Holroyd* to appear before Commissioner *Goulburn*; but Commissioner *Holroyd* had no authority to issue that summons. The notice is also bad because it was not served till after the first of the two days appointed by the bankrupts to surrender had elapsed. A bankrupt ought to have full notice and have all the time allowed him by law for surrendering. The notice here was to appear at a day which was past when the notice was left. To make a bankrupt liable to punishment for omitting to surrender, the omission must be wilful. *Ex parte Wood* (a), *Ex parte Bould* (b).

Sixthly. The sixth objection is that the bankrupt was summoned to appear before Commissioner *Goulburn* at the Court of Bankruptcy on a day on which that Commissioner did not sit, and therefore the bankrupt could not surrender before him; but this objection has been anticipated in my arguments as to the second.

Seventhly. This being the case of a joint fiat and of a substituted service, the service of one duplicate adjudication and of one duplicate summons to surrender was not sufficient. There ought to have been a separate copy of the adjudication and a separate copy of the summons to surrender left at the place of business for each bankrupt. One notice only being

left, suppose one partner came in and finding the notice there took it away, the other partner might never hear of the notice, much less have a knowledge of its contents. In criminal matters each person must be shown to have committed an offence before he is liable to be punished ; one partner cannot act for the other or render the other liable to punishment. If one partner, as I before suggested, took the one notice away, the other, knowing nothing about it, might be deprived of his right to dispute the adjudication by allowing the time limited to elapse ; *Ex parte Castelli* (a). Section 112 privileges a bankrupt from arrest in coming to surrender. Each bankrupt ought to be able to produce a summons to any officer who may attempt to arrest him, as his protection ; for the summons is the document on which the protection from arrest is indorsed by the Commissioner.

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PARKE B.—If you can say that this summons is necessary as a protection to each of the bankrupts, it would be a strong argument to show that one is insufficient.

M. Chambers. A blank form of protection from arrest is always indorsed upon the summons, and was so in this case. When joint fiats were permitted, there was no intention to interfere with the rights of the parties, but the object was to facilitate the disposition of the property. Section 251 directs that the notice to surrender shall be served personally, or at the usual or last place of abode or business of the bankrupt, and where there is personal service or a service at the place of abode, a copy would be left with or for each bankrupt ; and when the service is at the place of business, it is quite as necessary to leave a copy for each. The word notice in the

(a) 1 De G. Mac. & Gr. 437.

1855. statute must be understood as "notices" where there is more than one bankrupt; *Regina v. Justices of Chesire* (*a*); and this mode of reading the statute is warranted by the interpretation clause, section 276.

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Eighthly. Assuming that upon the evidence the bankrupts had no knowledge of the adjudication, their going away must be taken to be merely to avoid process. There is no finding by the jury that they had the criminal intent pointed out by section 251 of the statute; namely, an intention to defraud, after knowledge of the bankruptcy. *Reg. v. Hill* (*b*); *Reg. v. Hilton* (*c*).

PARKE B.—Those cases were decided on the 6 *Geo. 4*, c. 16, s. 112, which is not in the same terms as this section. An intention to defraud is not required by section 251.

M. Chambers. The provisions in the old and new statutes are substantially the same, and in section 251 the words "with intent to defraud" override the whole section.

Ballantine, for the Crown, was directed to confine his arguments to the seventh objection. One copy of the adjudication, and one notice to surrender, were sufficient, and they are to be presumed, in the absence of evidence to the contrary, to have reached both the bankrupts. There was no necessity for a notice to produce the notice.

ERLE J.—It certainly was put in as a notice. I called it a summons, because it was so headed.

Ballantine. The practice has been to draw up the notice as a summons; but until after the bankrupt has surrendered it is no protection to him, and on his way to surrender he is protected without it. If, as suggested, one partner took the notice away and the

(*a*) 11 Ad. & Ell. 139.

(*b*) 1 Car. & K. 168.

(*c*) 2 Cox C. C. 318.

other knew nothing about it, that fact would be a lawful impediment, a good excuse for not surrendering within the meaning of section 251.

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No doubt if there is more than one bankrupt and they reside in separate abodes, a copy of the notice, if served personally or at the places of abode, must necessarily be served upon or left for each bankrupt; but the same necessity does not exist where the place of service is the joint place of business. Actual notice is not required by law; nor has every possible means been afforded by the Legislature of giving the information to the bankrupt; but the statute gives to the bankrupt a certain reasonable chance of learning the fact of the adjudication by requiring a service in one of the ways pointed out, and the statute does not even require that the notice shall be addressed to the bankrupt.

Jervis C. J.—Surely it must be left *for* the bankrupt.

Cresswell J.—If the notice were left at the last place of abode of a bankrupt, would it be good if addressed to the new occupier?

Wightman J.—Do you go the length of saying that one notice would be sufficient if two persons who had never been partners had one place of business and were both adjudicated bankrupts?

Ballantine. A trader who, having committed an act of bankruptcy, keeps out of the way of receiving information, ought not to be able to say I am not guilty of a crime in not surrendering, because I have not had actual notice of the adjudication.

Montagu Chambers replied.

Jervis C. J.—As to seven of the eight objections which have been made we entertain no doubt; those seven are the first six and the eighth objections. The seventh objection we will take time to consider. The

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first objection was that the proceedings in the bankruptcy were inadmissible in evidence on account of erasures and interlineations; and Mr. *Chambers* contends that the finding in the case that the alterations were made before the instruments were used as complete, does not apply to the affidavit of verification; but independently from it appearing that the Judge who tried the case was satisfied from the evidence that the alterations had been made before the documents were used, the rule is clear that wherever an alteration in a document would involve a charge of fraud or misconduct, the presumption is against such fraud or misconduct having been committed. We must therefore, until the contrary be proved, presume that the affidavit of verification when sworn was in the same state in which it was when produced. The only exception to this rule is in the case of wills; it is therefore not necessary for us to consider whether the finding in the case that all the documents were altered before being used, applies to the affidavit of verification. As to the second objection that each of the Commissioners, on the allotment of a petition to him, became a separate Court, and could alone deal with the case; that is not, I think, a correct view of the 94th section. It is a mistake to suppose that the proceedings would be void if the directions of that section were not observed, although persons might be liable to penalties for not complying with those directions. But there is no ground for saying that there is any such liability in this case. It is provided by section 6, that each Commissioner may sit and have the full powers of the Court. Section 19 gives the Lord Chancellor a power of changing the Commissioners; but that does not show that they cannot change duties amongst themselves without leave of the Lord Chancellor. The summons to surrender

is in effect a summons to appear before the Commissioner mentioned in it, or such other Commissioner as shall be sitting at the time appointed for surrendering. Attendance upon a summons before one of the Judges of the superior Courts at *Westminster* is not confined to the Judge who issues the summons. Thirdly, it is objected that the search for the duplicate adjudication and duplicate summons was not sufficient to enable secondary evidence to be given on the part of the prosecution. We need not consider whether a notice to produce was necessary, for notice to produce was given. The rule is, that the best evidence must be produced, and that rule has been complied with. Either the original document must be produced, or it must be proved that reasonable efforts to produce it have been made; and it seems to me that the search made in this case was sufficient. The documents were left at the last known place of business of the bankrupts; search was made at that place and the documents were not found. The presumption therefore is, either that the bankrupts have got them, or that they have got into the hands of some person to whom they are of no importance, and who therefore has destroyed them. If you do not find a document in the ordinary place of deposit, or in the hands of the person who has an interest in preserving it, it may be presumed to be lost. The fourth objection is, that there was a variance between the adjudication and the advertisement in the *Gazette*. It is argued that, because the bankrupts are described in the *Gazette* as of some place in *London* and of *West Ham Lane, Middlesex*, when in the previous proceedings and adjudication *West Ham Lane* is said to be in *Essex*, they had a right, as it were, to hold a Court in their own chambers abroad, and to supersede the proceedings in bankruptcy for the misdescription; but the error is only a *falsa*

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1855. *demonstratio*, which does no harm, and no one can entertain any doubt but that the bankrupts well knew who were meant by the description. The cases which have been cited of applications to supersede commissions, on the ground of mistake or misdescription, are governed by a different principle. The fifth objection is that the summons to surrender was insufficient, for two reasons: first, it is said that it was not a notice and did not operate as a notice, because it was issued by Commissioner *Holroyd*, when the proceedings in the bankruptcy were before Commissioner *Goulburn*. This has been disposed of already in considering the second objection. But it is further said not to be a good notice, because it was to appear on two days, the first of which had expired before the notice was served; but looking at sections 104 and 251, it is clear that the bankrupt is to have notice to appear and dispute the adjudication, or surrender on the day limited for that purpose; and the day limited is the last of the two days named in the notice. The sixth objection is, that Commissioner *Goulburn* was not sitting on the day limited for the surrender; but this point has been disposed of in considering the second objection. The eighth objection is that the bankrupt had no knowledge of the proceedings, and that therefore there was no intent to defraud within the statute. The jury have found that the bankrupts went abroad, with the view of defrauding their creditors, by depriving the latter of the power of examining them and making them responsible. Knowledge is not required by the statute. If the notice to surrender was duly served (which point we shall not now dispose of), and the bankrupts did not surrender pursuant to it, the offence is committed. It is not necessary to decide whether the words "with intent to defraud," in section 251, override the entire section, for the fact of the bankrupts having absconded,

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with the intent stated in the case, and found by the jury, is quite sufficient to prove the intent to defraud.

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The other learned Judges concurred.

As to the first, second, third, fourth, fifth, sixth and eighth objections,

Conviction affirmed.

As to the seventh objection,

Cur. adv. vult.

It was subsequently directed that the seventh objection should be argued before all the Judges, and previously thereto the following case, embodying the seventh objection, was stated by Mr. Justice ERLE.

The indictment was for felony in not surrendering as a bankrupt pursuant to 12 & 13 Vict. c. 106, s. 251, and the prisoner was properly convicted, unless the following objection should be found valid.

The prisoner and his partner *Davidson* were proved to have committed an act of bankruptcy on the 17th of *June*, 1854, by departing the realm with intent to defeat and delay their creditors, and also to have continued abroad long after the day limited for their surrender with the same intent.

One paper containing a duplicate adjudication in bankruptcy was left at the counting-house in *Mincing Lane*, being the usual and last known place of business of the bankrupts, on the 21st *June*. All the papers and property of the bankrupts were removed therefrom, and the place was locked up on behalf of the assignees on the same day, but this paper was left and seen there a fortnight or three weeks after this removal.

On the 26th of *July* one other paper containing notice of the days limited for surrender and for finishing the examination was proved to have been

1855. left at the same counting-house, which was unlocked for that purpose, and then locked up again.

GORDON'S Case. A copy of the paper containing the notice last mentioned is annexed.

The objection was, that the requirement contained in s. 251 was not proved to have been complied with by the evidence above mentioned ; that, as the adjudication in bankruptcy was against two jointly, two duplicate adjudications and two papers of notice ought to have been left at the counting-house of the two bankrupts, and as only one paper of each sort was left the proof of the felony failed.

The indictment and the proceedings in bankruptcy are in Court to be referred to if necessary.

The question is, whether this objection is valid.

W. ERLE (a).

(a) The following is a copy of the summons or notice to surrender annexed to the case :—

“ THE BANKRUPT LAW CONSOLIDATION ACT, 1849.

“ *Bankrupt's Summons.*

“ Whereas a petition for adjudication of bankruptcy having been filed in her Majesty's Court of Bankruptcy in *London*, on the 20th day of *June*, 1854, against you *Daniel Mitchell Davidson* and *Cosmo William Gordon*, of *Mincing Lane* and of *Cousin Lane, Upper Thames Street*, in the city of *London*, colonial brokers and metal agents, and of *West Ham Lane*, in the county of *Essex*, distillers, dealers and chapmen, and co-partners in trade, and you having been duly declared bankrupts, I the undersigned, a Commissioner of her Majesty's said Court of Bankruptcy, do hereby summon and require you the said *Daniel Mitchell Davidson* and *Cosmo William Gordon* personally to be and appear before

Edward Goulburn, Sergeant-at-law, at the Court of Bankruptcy, in *Basinghall Street*, in the city of *London*, on the 7th day of *July*, 1854, at twelve o'clock in the forenoon precisely, and on the 19th day of *August*, 1854, at twelve o'clock at noon precisely, the last named day being the day limited for your surrender under the said petition, and you are then and there to be examined, and to make a full and true discovery and disclosure of all your estates and effects according to the direction of the statute now in force concerning bankrupts, and herein fail not at your peril.

“ Given under my hand this 25th day of *July*, 1854.

“ *E. Holroyd*, Commissioner.
“ To *Daniel Mitchell Davidson* and
Cosmo William Gordon, the
above-named bankrupts.”

The seal of the Court of Bankruptcy and the seal of the Registrar were affixed to the notice. On

The case as to this objection was argued on the 30th November, 1855, before Lord CAMPBELL C. J., JERVIS C. J., PARKE B., ALDERSON B., WIGHTMAN J., CRESSWELL J., ERLE J., PLATT B., WILLIAMS J., CROMPTON J. and WILLES J.

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Bramwell Q. C. (with him *Poland*) appeared for the Crown; and *Montagu Chambers, Q. C.* (with him *O. B. C. Harrison*) for the prisoner.

Montague Chambers, for the prisoner, urged the same arguments as on the previous hearing of the case.

Bramwell Q. C. for the Crown, used the same arguments as had been submitted to the Court by *Ballantine* on the previous occasion, and contended that the literal requisitions of the act had been fulfilled, and that the defendant could not say that a notice had not been left at his last place of business as required by the statute.

Chambers Q. C. replied.

LORD CAMPBELL C. J.—I am of opinion that the objection taken is fatal. The point is a short one; and I have but little to add to what has been said in the course of the argument. By the 251st section of the Bankrupt Law Consolidation Act, a felony is created punishable with transportation for life; and the offence is committed by any person adjudged bankrupt not surrendering himself upon the day limited for his surrender, but it is upon the fulfilment of certain conditions, one of which conditions is very carefully worded thus; the offence cannot be committed until “after notice thereof in writing to be served upon him personally, or left at the usual, or last known place of abode or business of such person, or personal notice in case such person be then in prison.” Now the question is, there having been a joint adjudic-

1855. cation against two bankrupts, both having the same place of business, one notice of the day limited for the surrender left at that place of business is sufficient service on both the bankrupts? I am of opinion, that there ought to have been a separate and distinct notice for each. With respect to personal service, it is quite clear that when that mode of service is resorted to, there must be a separate notice served on each bankrupt, and so in service at the usual or last place of abode, it must be a service at the last place of abode of each, and the same construction, I think, applies to the remaining mode of service.

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It is of great importance that before such an offence as that which is created by this statute should be consummated, the best chance that the circumstances will allow should be given that the party to be charged with such offence should receive the notice directed by the statute to be given; and I think that the legislature intended that where there is more than one bankrupt, each should have a notice, although they may all have one and the same place of business. This might easily be done, and if a contrary construction be put upon the statute great inconvenience may arise. If one of several bankrupts comes to the place of business, and, finding a notice there, carries it away, he leaves the others without the means of knowing that such a notice has ever been left, without the means of obtaining that information which the legislature intended they should have. Each bankrupt, by having possession of a notice, would have the opportunity of perusing it, and consulting his legal advisers upon it; it serves to remind him of the day and hour limited for his surrender, and that he incurs the penalty of felony by not surrendering.

It seems to me that it was the intention of the legislature that in cases where the adjudication is against

two or more persons there should be a separate and distinct notice to each of the bankrupts.

JERVIS C. J.—I do not concur with the Lord Chief Justice. I think the notice given was sufficient; but as I believe the majority of the Judges are against me, the conviction will be quashed.

PARKE B.—I entirely concur with the Lord Chief Justice of the Queen's Bench for the reasons which he has given. The legislature meant to give the best chance of getting the notice to each bankrupt. This notice of the day limited for the surrender is the summons upon which the statute directs the protection to be indorsed.

ALDERSON B.—I am of the same opinion with the majority of the Judges.

WIGHTMAN J.—I am also of the same opinion.

CRESSWELL J.—I concur with my Lord *Campbell* and the majority, and for the same reasons.

ERLE J. concurred with the Lord Chief Justice of the Common Pleas in thinking the conviction good. If the bankrupts do not abscond, one piece of paper would give them all notice; if they do abscond, any number of notices would be of no use.

PLATT B.—I think the statute has been complied with, and I do not see what reason there can be for two notices. Here there are two bankrupts having one place of business, and a joint notice to both left at that place of business seems to me to be sufficient.

WILLIAMS J.—I agree with the majority of the Judges.

CROMPTON J.—I also agree with the majority, and think the conviction bad.

WILLES J.—I think that the conviction ought to be affirmed. By sect. 251, the notice to be given to a bankrupt in prison need not be in writing. I do not

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1855. think that the provision that the notice may be served personally limits the effect of the following words of GORDON'S Case, the section as to the other modes of service.

Conviction quashed.

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REGINA v. HENRY SHEPHERD.

The prisoner was convicted on an indictment charging him in one count (under sect. 26 of 7 Wm. 4 & 1 Vict. c. 36) with stealing a *post letter* containing money, and in another count with a simple larceny of the money.

It appeared that suspicion being entertained against the prisoner who was a sub-sorter in the employ

of the General Post Office, the Post Office authorities made up a letter and inclosed in it a sovereign and two shillings, and put on the letter the usual postage stamp. The ordinary course of posting a letter at the outer hall of the General Post Office is by placing it in the receiving box; but this letter an inspector delivered in at the window in the outer hall to another inspector, who handed it to a third, who, after locking it up for the night, handed it to a sorter, who placed it amongst the letters which it was the prisoner's duty to sort. The prisoner stole the letter and the money. Held, that the prisoner was not rightly convicted of stealing a *post letter* containing money; and that the verdict must be confined to the count for simple larceny.

THE following case was reserved for the consideration of the Court of Criminal Appeal by Mr. Baron ALDERSON.

Prisoner was indicted for stealing, he being a sub-sorter at the General Post Office, a letter containing a sovereign and two shillings. It appeared that the Post Office authorities, entertaining suspicions of the prisoner, had caused to be made up a letter directed for Mr. T. Higgins, addressed and enclosed therein the money in question. The letter had on it the usual postage stamp. Mr. Playle, an inspector, accordingly having sealed up this letter, delivered it in at the window in the outer hall of the General Post Office in St. Martin's-le-Grand, personally to Mr. Gardiner, another inspector, who received it and handed it to Willis Clare, another inspector. Willis Clare, having

received the letter from *Gardiner*, locked it up for the night in an iron chest for safe keeping, and on the following morning handed it to a sorter of the name of *Scales*, with directions to him to place it with the other letters which, in the due course of office, the prisoner would have to take and sort and deliver over to *Willis Clare* himself in the Letter Carriers' Office. *Scales* accordingly, having thus received the letter from Mr. *Clare*, took an opportunity when the prisoner did not observe him of taking up some letters which the prisoner had to sort, and then taking the letter in question out of his pocket mixed it with them, and placed the whole, including this letter, on the prisoner's seat, and after having done so directed the prisoner, who had sorted them, to take up the letters to Mr. *Clare*'s office in due course. During this interval the prisoner, either in sorting the letters so placed on his seat by *Scales*, or in taking the letters up to Mr. *Clare*'s office, opened and secreted the letter in question, the marked money being found upon him when he was searched in Mr. *Clare*'s office. It appeared that, in the ordinary course of posting a letter at the outer hall of the General Post Office, Mr. *Playle* would have placed it in the receiving box in the outer hall, instead of delivering it to Mr. *Gardiner* personally at the window. The question upon these facts was, whether this amounted to stealing a post letter (*a*) or only to a larceny of the money in question,

(*a*) Sect. 26 of 7 Wm. 4 & 1 Vict. c. 36, on which the first count of the indictment was founded, enacts "that every person employed under the Post Office who shall steal or shall for any purpose whatsoever embezzle, secrete or destroy a post letter shall in England and Ireland be guilty of felony, and in Scotland of a high crime and offence, and shall at the discretion of the Court

either be transported beyond the seas for the term of seven years or be imprisoned for any term not exceeding three years ; and if any such post letter so stolen or embezzled, secreted or destroyed, shall contain therein any chattel or money whatsoever, or any valuable security, every such offender shall be transported beyond the seas for life."

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and the following cases were cited : *Rex v. Gardiner* (1 Carrington and Kirwan, 628); *Rex v. Young* (1 Denison C. C. 194), and *Rex v. Rathbone* in a note to that case. I thought the last case was almost precisely in point, but directed the prisoner to be convicted of the whole indictment, reserving the question whether the verdict should not have been confined to the count for the larceny alone, and respite the judgment for the purpose of consulting the Judges thereon, and I request their opinion accordingly.

E. H. ALDERSON.

This case was argued on 19th January, 1856, before POLLOCK C. B., ALDERSON B., CRESSWELL J., WILLIAMS J. and WILLES J.

Clarkson appeared for the Crown, and *Metcalf*e for the prisoner.

*Metcalf*e, for the prisoner. *Regina v. Rathbone* (a) is precisely in point, and the decision governs this case. There an assistant inspector wrote a letter, and having enclosed in it a marked sovereign, sealed the letter, placed it among a number of letters which the prisoner (a letter carrier) was sorting, and the prisoner stole it; but upon his being indicted for stealing a *post letter*, it was held that he could not be convicted of that offence, the ground of the decision being that the statute only applied to letters put into the post in the ordinary way. The only difference between that case and the present is, that in *Regina v. Rathbone* the assistant inspector, who wrote the letter, placed it himself with letters which the prisoner was sorting; and here one inspector went through the farce of handing it to another inspector through the window,

and that inspector locked it up for the night, and then handed it to a sorter, who placed it amongst the prisoner's letters. The letter never passed through the post in the ordinary way.

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Clarkson, for the Crown. The Post Office authorities consider this case of much importance. *Reg. v. Young* (*a*) decided that a fictitious or trap-letter was a post letter within the statute. In that case the letter was dropped into the letter box of the receiving house ; here it was put through the window ; and the real question is, whether a letter put in at the window by one officer and received by another is a letter posted so as to make it a post letter ?

ALDERSON B.—This letter was not posted in the ordinary way ; it was much the same as though the man had climbed through the window with the letter in his pocket.

Clarkson. There was a case tried at *Winchester* before Mr. Baron *MARTIN*, which in its facts was similar to this, and the learned Judge was of opinion that the letter was a post letter within the meaning of the statute, and the prisoner was convicted (*b*).

CRESSWELL J.—Suppose that *Playle* had taken the letter in his pocket and given it to *Gardiner*, would that have done ?

Clarkson. I must go that length. The question is important in this respect, that the letters in the receiving offices in *London* are gathered in bags and brought to the Post Office in those bags, and are there sorted, many of them never passing through a letter box ; and numbers of letters are written in the Post Office and never put in the letter box at all. Then, are such letters post letters ? The interpretation

(*a*) 1 Den. C. C. 194.

(*b*) Neither the date or name of this case was given by the learned

Counsel, who referred to this supposed decision on the instructions of the solicitor to the Post Office.

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clause, section 47, says, "the term post letter shall mean any letter or packet transmitted by the post under the authority of the Postmaster General; and shall be deemed a post letter from the time of its being delivered to a post office to the time of its being delivered to the person to whom it is addressed; and the delivery to a letter carrier or other person authorized to receive letters for the post shall be a delivery to the Post Office."

CRESSWELL J.—Is there any evidence that *Gardiner* was authorized to receive paid letters at the window?

Clarkson. What the inspectors did in this case was done under the authority of the Postmaster General, and although the letter was not intended to be delivered in *Reg. v. Young*, PARKE B. said, that whether a letter could be delivered or not was beside the question.

Metcalfe, in reply. The letter never was out of the manual possession of the persons who concocted the scheme, and never was received by any body as a post letter.

WILLIAMS J.—It would make no difference that it was received irregularly if it was received officially.

Metcalfe. No; but this letter never was received officially.

POLLOCK C. B.—I think this case is governed by *Reg. v. Rathbone*. It differs from that case only in one circumstance. In *Reg. v. Rathbone*, the letter was sealed and marked as if it had been put in the post in the regular way and placed among a number of letters which the prisoner was sorting. Here the letter was put in through the window by one inspector, received by another inspector, and passed by him to a third, who after locking it up for the night delivered it to a sorter, with instructions to place it with those which the prisoner had to sort. We are not now called upon

to say whether the letter would have been a post letter within the meaning of the act if it had been thrown into the receiving box, and afterwards taken out and placed amongst the prisoner's letters; perhaps it would, but that case is not before us. What was done in this case was done merely to get rid of the effect of the decision in *Reg. v. Rathbone*; but the person who first received the letter was not entitled to receive it, and he handed it to a person who was not entitled to take it; in fact no one received the letter who was authorized so to do.

ALDERSON B.—I am of the same opinion. This case is not distinguishable from *Reg. v. Rathbone*, which was decided by the fifteen Judges.

CRESSWELL J.—I am of the same opinion. There is nothing less desirable than fine and subtle distinctions; and I am unable to see any substantial distinction between *Reg. v. Rathbone* and this case.

WILLIAMS J.—I also think that we are governed by the decision in *Reg. v. Rathbone*; although I do not go to the full extent of adopting all that my brother PARKE said in that case.

WILLES J.—I reluctantly yield to the authority of the decision in *Reg. v. Rathbone*, but I think that when it had once been held that trap-letters were within the statute, it might have been better to have decided otherwise; but *Reg. v. Rathbone* seems to decide that the statute only applies to letters put into the post in the ordinary way; the letter in this case was not put into the post in the ordinary way, nor does it appear that any person who received it was justified in receiving it.

Conviction on the count for stealing a post letter quashed.

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REGINA v. JOSEPH AUSTIN and JOHN TURNER.

The prisoners were convicted of larceny. On the trial the prosecutor not being in attendance, his deposition (which had been duly taken before the committing magistrate) was received in evidence, it appearing that he was not absent from an intention to defeat justice, but that being a foreigner, who, at the time the larceny was committed, was serving on board a foreign vessel, he had returned to his own country, and was, at the time of the trial, residing abroad. Held, that the deposition was inadmissible.

THE following case was stated for the opinion of the Court of Criminal Appeal by *W. H. Bodkin* Esq., acting as Assistant Judge at the *Middlesex Sessions*.

Joseph Austin and *John Turner* were tried before me, acting as Assistant Judge, at a Sessions for the county of *Middlesex*, on the 14th day of *August*, 1855, for stealing various articles, the property of *William Doodt*.

The charge was fully established against them ; they were found guilty and sentenced to penal servitude for six years. They were ordered to remain in prison ; but the execution of the judgment was respite until the opinion of the Criminal Court of Appeal could be obtained upon the following facts :

William Doodt, not being in attendance to prove that the stolen property was rightly stated to belong to him, it was proposed to read the deposition taken before the committing magistrate as evidence of that fact. The deposition had been duly taken in the presence of the prisoners, who had the opportunity of cross-examination, and it was satisfactorily proved that *William Doodt* was not absent with any intention of defeating justice ; but that, being a foreigner, serving on board a foreign vessel at the time the property was stolen, he had, since the committal of the prisoners, returned to his own country, and at the time of the trial was residing in a foreign kingdom. It was contended that, although this cause of absence was not

within the provisions of the 11 & 12 Vict. c. 2, s. 17, the above facts made the deposition receivable, independently of that statute ; and, considering it desirable to have the point settled, I received the evidence.

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I have now to submit to the Justices of either Bench and Barons of the Exchequer whether such reception was right.

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W. H. Bodkin.

This case was argued on the 24th of November, 1855, before JERVIS C. J., PARKE B., WIGHTMAN J., CRESSWELL J. and WILLES J. ; but the arguments not being concluded, it was re-argued (by the same Counsel) on the 19th of January, 1856, before POLLOCK C. B., ALDERSON B., COLERIDGE J., WILLIAMS J. and WILLES J.

Metcalfe, for the prisoner. Section 17 of the statute 11 & 12 Vict. c. 42 limits the admissibility of depositions to two cases, namely where the witness is either dead or so ill as not to be able to travel ; at all events the deposition in this case was not admissible by virtue of the statute, and independently of the statute it would not have been admissible at common law. He cited *Rex v. Savage* (a), *Regina v. Hagan* (b).

Caarten, for the Crown. The deposition was admissible at common law. Previously to the statute depositions were admissible when the witness who made them was dead, or insane without hope of recovery, or personally disabled from attending, or was sent out of the way by the prisoner, or by some one on his behalf, and a witness who is out of the jurisdiction, and cannot be compelled to attend by process of subpœna or otherwise, may for the purposes of the trial be considered as dead in law ; that would

(a) 5 Car. & P. 143.

(b) 8 Car. & P. 167.

1856. only be carrying out the principle that the best evidence of which the case is capable must be produced.
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ALDERSON B.—There is nothing in this case to show that the witness would not have attended if he had been asked, or that any attempt was made to bring him, and if depositions under such circumstances were received a precedent would be established of frightful consequences to the public, and a witness by merely keeping away would be able to deprive the prisoner of the power of cross-examination.

Caarten. There is no case directly in point, but there is no decision the other way.

POLLOCK C. B.—It is contrary to the universally received practice.

Caarten referred to 1 *Hale P. C.* 305 (a); 2 *Hale P. C.* 52; 1 *Chitt. C. L.* 586; *Godbolt*, 326 (b); *Lord Anglesea v. Lord Altham* (c); *R. v. Hagan* (d); *Boyle v. Wiseman* (e).

POLLOCK C. B.—We are all of opinion that the deposition was inadmissible. Section 17 of 11 & 12 Vict. c. 42 enumerates the cases in which the depositions of persons not in attendance at the trial may be read in evidence, and this is not one of those cases. Independently of the statute the reception of the deposition in this case was against the universal practice, and we have a decided case to confirm that practice.

COLERIDGE J.—I must not be taken as expressing an opinion that the statute limits the admissibility of

(a) In the passage referred to, after stating that depositions taken under 1 & 2 P. & M. c. 14, may be read in evidence, if the informant be dead or not able to travel, it is said, “Yea, by some opinion, if he were bound over and appear not, they may be read, which seems to be questionable.”

(b) It was there said by the Court, that “if the party cannot find a witness, then he is as it were dead unto him.” But see *Sir Francis Fortescue and Coake's case*, *Godbolt*, 193.

(c) 2 *Holt Rep.* 736.

(d) 8 *Car. & P.* 167.

(e) 10 *Exch.* 647.

depositions to the cases therein enumerated, and I do not think that the Lord Chief Baron intended to be so understood. It is quite possible that cases may occur in which depositions would be receivable in evidence under the old rule and independently of the statute ; in this case however it is consistent with what appears that the attendance of the witness might have been obtained, and it is not shown that anything was done by writing or otherwise to procure his attendance.

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WILLES J.—We must look for a broader proposition than that the statute limits the admissibility of a deposition where the witness is absent at the trial. If the witness is dead or insane, or unable to travel, or is kept away by the prisoner, you cannot have his oral testimony, and his deposition can be used as evidence ; but it cannot be so used unless it is made quite clear that the oral testimony cannot be obtained.

ALDERSON B. intimated that if the admissibility of depositions was extended beyond the cases provided for by the statute, the rule ought to be minutely and rigidly limited ; as it would equally apply to depositions taken before a coroner in the prisoner's absence, and without any opportunity of cross-examination having been afforded.

Conviction quashed.

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REGINA v. HENRY BROWN.

The prisoner was convicted of larceny. It appeared by the evidence that the prosecutor, in the hearing of the prisoner, told his servant that he must go to *S.* and pay him money, upon which the prisoner offered to take it, falsely stating that he lived only six doors from *S.* This statement induced the prosecutor to deliver the money to the prisoner to carry to *S.*; but the prisoner, instead of carrying the money to *S.*, converted it to his own use. The jury, on finding their verdict of guilty, stated that their verdict was grounded on the belief that the prisoner had obtained the money by a trick, intending at the time to appropriate it to his own use. Held, that the conviction was right.

THE following case was reserved for the opinion of the Court of Criminal Appeal by the Recorder of London.

At a General Session of Gaol Delivery holden for the jurisdiction of the Central Criminal Court on the 17th day of November, 1855, *Henry Brown* was tried and found guilty before me of stealing money upon evidence which, as far as material to the present case, is hereinafter set forth.

That of the prosecutor was as follows:

I am a licensed victualler. On the 31st October last, he (prisoner) was at my house; I owed some money to the poor rate collector (Mr. Staines).

I said to my servant in the prisoner's hearing, "George, you must go to Mr. Staines, and pay him this money."

That thereupon the prisoner said, "I will take it for you," adding that he lived only six doors from the collector.

That, induced by the offer of the prisoner, he, the prosecutor, delivered to him money to the amount of 1*l.* 12*s.* to carry to the poor rate collector in discharge of the said debt. The other evidence showed that the prisoner's statement to the prosecutor was in all its parts false, and that he had converted this money to his own use.

That, induced by the offer of the prisoner, he, the prosecutor, delivered to him money to the amount of 1*l.* 12*s.* to carry to the poor rate collector in discharge of the said debt. The other evidence showed that the prisoner's statement to the prosecutor was in all its parts false, and that he had converted this money to his own use. Held, that the conviction was right.

Upon the trial it was objected, on behalf of the prisoner, that those facts did not amount to larceny, that the prosecutor had parted both with possession and the property of and in the monies, the subject of the indictment, and that the prisoner was a bailee, and the case of *The Queen v. Thomas* (*a*) was cited in support of this proposition. I told the jury that the act of the prisoner amounted to larceny if they should be of opinion that he had obtained the money by a trick, and meaning at the time to appropriate it to himself; but that if he took it from prosecutor bona fide, and afterwards converted it to his own use, it was not larceny, and I so directed them. The jury, in finding the prisoner guilty, stated that their verdict was grounded on their belief that the prisoner had obtained the money by a trick, intending at the time to appropriate it to his own use.

Entertaining doubts as to the propriety of my ruling, I have to request the judgment of the Court for the Consideration of Crown Cases, whether the prisoner has been properly convicted of larceny; and in order that the same may be taken I have respited judgment upon the prisoner who stands committed to the gaol of *Newgate*, awaiting the determination of this case.

J. Stuart Wortley, Recorder.

This case was argued on 26th *January*, 1856, before POLLOCK C. B., COLERIDGE J., CRESSWELL J., WILLIAMS J., and MARTIN B.

Payne appeared for the Crown. No Counsel appeared for the prisoner.

POLLOCK C. B.—Can this case be distinguished from *Major Semple's case* (*b*)? I think it cannot.

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Payne. Fraud destroys the bailment. In this case the bailment was destroyed by the fraud of the prisoner. The jury have found that the prisoner obtained the money by a trick, intending at the time to appropriate it to his own use. That being so, the delivery of the money by the prosecutor to the prisoner to carry to the poor rate collector, did not change the property, nor did it constructively change the possession.

He was then stopped by the Court.

POLLOCK C.B.—The conviction must be affirmed (*a*). The other learned Judges concurred.

Conviction affirmed.

(*a*) POLLOCK C. B. said there was a case, which he had not seen reported, tried before Lord *Ellenborough*, in which a banker's clerk persuaded customers at the bank where he was employed to allow him to place money of his to their accounts, and thereby (and by other

devices) managed to obtain money belonging to the bank; and Lord *Ellenborough* held that he was guilty of stealing, saying that the machinery by which a man gets the property of another out of his possession makes no difference in the offence.

REGINA v. JAMES JUSSUP.

1856.

THE following case was stated for the opinion of the Court of Criminal Appeal by the Recorder of Canterbury.

The prisoner, a volunteer in a militia regiment assembled for the purpose of being exercised, and therefore subject to the Mutiny Act, when taken to be attested before a deputy-lieutenant, in answer to questions contained in the form of attestations for militia volunteers issued by the War Office, said, that he did not belong to nor had been enrolled in any other corps of militia, and that he did not belong to nor had served in her Majesty's army; where-as in truth he had previously been enrolled in another corps of militia. He was then sworn and

The prisoner was tried and convicted before me at the Quarter Sessions for the city of Canterbury, holden on the 31st day of December 1855, upon an indictment for a misdemeanor, which contained three counts. The first count was framed upon that portion of the 57th section of the Mutiny Act, 18 & 19 Vict. c. 11., which provides that any recruit who shall designedly make any false representation of any particular contained in the oaths and certificates in the schedule to this act annexed, before the justice at the time of his attestation, and shall obtain any enlisting money or bounty for entering into her Majesty's service, shall be deemed guilty of obtaining money under false pretences, within the true intent and meaning of the 7 & 8 Geo. 4. c. 29. The second count was framed on the statute 7 & 8 Geo. 4. c. 29., and charged in substance that James Jussup, being a recruit, and before being attested to serve as a volunteer in the Kent Artillery Militia, unlawfully, knowingly, and designedly, did falsely pretend to James O'Neill, that he, Jussup, had not been enrolled in any other corps of militia, by means of which false pretence he obtained from O'Neill the sum of ten shillings, the property of O'Neill, with intent to de-

received the bounty money. Held, that he could not be convicted upon an indictment framed under section 57 of the Mutiny Act, 18 & 19 Vict. c. 11., as the forms in the schedule to that act contained no such question as had been put to the prisoner respecting his previous enrolment in the militia; and as his negative answer to the question whether he had served in the army could not be considered wilfully false.

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fraud, whereas, *Jussup* had prior to the making of the said false pretence been enrolled in the *West Kent Militia*.

The 3rd count was similar to the 2nd, except in stating the false pretence to have been made to *John Henry Hay Ruxton*. Upon the part of the prosecution a printed form supplied by the War Office, and headed "Attestations for militia volunteers" was proved and read. It contained several questions, all of which were asked of the prisoner at the time of his enlistment, with his answers. A copy of the form is annexed to the case (a), with the answers of the pri-

(a) The following is a copy of the form referred to :—

ATTESTATIONS FOR MILITIA VOLUNTEERS.

Question 1. What is your name? *Answer.* *James Jussup*. *2.* In what parish and in or near what town, and in what county were you born? In the parish of *St. Mary's* in or near the town of *Dover* in the county of *Kent*. *3.* Where do you now reside? In the parish of *St. Mary's* in or near the town of *Dover* in the county of *Kent*. *4.* Where have you resided for the last twelvemonth? In the parish of *St. Mary's* in or near the town of *Dover* in the county of *Kent*. *5.* What is your age? Twenty-five years three months. *6.* What is your trade or calling? Bricklayer. *7.* Are you an apprentice? No. *8.* In whose employ are you? Mr. *John Hopper*, builder, in or near the town of *Dover* in the county of *Kent*. *9.* What is the name and residence of your former master? Mr. *John Stiff*, builder, in or near the town of *Dover* in the

county of *Kent*. *10.* Are you single, married, or a widower? Single. *11.* If married or a widower, how many children have you under fourteen years of age? None. *12.* Are you ruptured or lame, have you ever been subject to fits, or have you any disability or disorder which impedes the free use of your limbs, or unfit you for ordinary labour? No. *13.* Are you willing to be attested to serve as a volunteer for the militia for the county of *Kent* for the term of five years, provided her Majesty should so long require your services? Yes. *14.* Do you belong to or have you been enrolled in or rejected by any other corps of militia, or do you belong to her Majesty's army or to the marines, ordnance or navy, or to the forces of the *East India Company*? No. *15.* Have you ever served in or been rejected by the army, marines, ordnance or navy, or the forces of the *East India Company*, or are you in receipt of a pension for any such service?* No.

* If the volunteer has served as above, he is to state the particulars of his former service and the cause of his discharge, and is to produce the certificate of his discharge if he has it with him. If in receipt of pension, he must produce an authority for enlisting from the staff officer of pensioners by whom he is paid.

soner to the questions numbered 14 and 15, which questions and answers alone were material. Question 14 is, "Do you belong to, or have you been enrolled in, or rejected by, any other corps of militia? or do you belong to her Majesty's army? or the marines, ordnance or navy? or to the forces of the *East India Company*?" Answer. "No." Question 15 is, "Have you ever served in, or been rejected by, the army, marines, ordnance or navy, or the forces of the *East India Company*? or are you in receipt of a pension for any such service?" Answer. "No." The prisoner upon the 2nd of November 1855, when brought before the deputy-lieutenant, to be attested as a recruit for the *Kent Artillery Militia*, gave those answers, and affixed his signature to the form in the presence of Serjeant *James O'Neill*, who was the recruiting serjeant, and who paid to the prisoner ten shillings as enlisting money, believing his answers to questions 14 and 15 to be true. At the time of the prisoner's enlistment, the *Kent Artillery Militia* was assembled for the purpose of being trained and exercised. The form was duly signed and completed in all respects by the proper parties to it, and the particulars disclosed upon the face of it were filled in. To prove the falsehood of the prisoner's representation, it was shown that prior to the month of *May* 1853 he had been enrolled in, and served as, a private in the *West Kent Militia*, and was discharged from that regiment in that month.

The jury found the prisoner guilty, and I ordered him to be imprisoned for three calendar months, and to be kept to hard labour; but I respited the execution of the judgment. The prisoner remains in prison. He was undefended. Upon reference to the questions to be put to a recruit on enlisting, set out in the schedule to the Mutiny Act, 11 & 12 Vict. c. 11.,

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1856. which appear to be continued, though not printed in each subsequent annual Mutiny Act, including the act 18 & 19 Vict. c. 11., there are no questions similar to those numbered 14 and 15 in the form used from the War Office on an enlistment. I was informed that false answers to questions numbered 14 and 15 in the War Office form, were frequently given by persons who had served in the militia, and entertaining doubts whether, in question 14 in the schedule to the act 11 & 12 Vict. c. 11., the militia are included in the term "army," I humbly ask the opinion of the justices of either Bench, and of the Barons of the Exchequer: 1. Whether the prisoner having obtained enlisting money by stating that he had not been enrolled in any corps of militia, and had not ever served in the army, when in truth he had been enrolled and had served in a militia regiment, committed an offence within the provisions of section 57 of the Mutiny Act, 18 & 19 Vict. c. 11.

2. If he did not commit an offence within the Mutiny Act, whether he was rightfully convicted upon either the 2nd or 3rd counts of the indictment?

This case was argued on 26th *January*, 1856, before POLLOCK C. B., COLERIDGE J., CRESSWELL J., WILLIAMS J. and MARTIN B.

F. Russell appeared for the Crown; no Counsel appeared for the prisoner.

F. Russell, for the Crown. The first question arises upon the first count, and is, whether the prisoner has committed an offence within the provisions of sect. 57 of the Mutiny Act, 18 & 19 Vict. c. 11. That section provides that any recruit who shall designedly make any false representation of any particular contained in the oaths and certificates in the schedule to this Act annexed, before the justice at

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the time of his attestation, and shall obtain any enlisting money or bounty for entering into her Majesty's service, or any other money, shall be deemed guilty of obtaining money under false pretences within the true intent and meaning, if in *England*, of the statute 7 & 8 Geo. 4. c. 29. Although the Mutiny Act does not itself apply to militia volunteers, the thirty-second section of the Militia Act 15 & 16 Vict. c. 50. incorporates the 42 Geo. 3. c. 90.; and by section 89 of that statute it is enacted, that "during such time as any militia shall be assembled for the purpose of being trained and exercised, all the clauses, provisions, matters, and things contained in any Act of Parliament, which shall then be in force for the punishing mutiny and desertion, and for the better payment of the army and their quarters, and in the articles of war made in pursuance of such act, shall be in force with respect to such militia." The case finds that the *Kent* Militia were assembled for that purpose when the prisoner entered into it, and therefore the Mutiny Act may apply.

Questions 14 and 15 in the form of attestation are not to be found in the schedule to the Mutiny Act; but there is this question, "Have you ever served in the army?" And it has recently been held that a militia-man is a soldier; *Overseers of Horton v. Overseers of Leeds* (a), and a man who has been enrolled in the militia cannot truly say that he has not served in the army.

COLERIDGE J.—That case was upon the construction of the statute attaching irremovability to a five years' residence.

WILLIAMS J.—If in strictness service in the militia is service in the army, the man might well think

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1856. that it was not intended to include it when the question was put. A distinction is made between the militia and the army in question 14; for by that question he is asked, "Do you belong to any corps of militia or do you belong to her Majesty's army?"

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MARTIN B.—What authority was there for putting the questions to the prisoner? They differ essentially from those contained in the Mutiny Act.

F. Russell. I find that, by section 16 of the 15 & 16 Vict. c. 50., the Secretary at War has power to make regulations respecting the attestation of militia-men, and the form produced at the trial was made under that provision, and must be presumed to be according to the regulations of the Secretary at War, as it was supplied by the War Office. It is provided by that section that the oath may be administered by a justice of the peace or deputy-lieutenant for the county. One question which arises is, whether a recruit examined and sworn under this section before a deputy-lieutenant, stands in the same position as if examined and sworn before a justice of the peace under the Mutiny Act.

POLLOCK C. B.—We are all of opinion that the conviction on the first count cannot be sustained.

F. Russell. Then there are the second and third counts, and I contend that the prisoner was properly convicted on those counts.

MARTIN B.—We are asked if the prisoner was properly convicted on these two counts. For my part I can form no opinion upon the statement before us whether he was properly convicted or not.

F. Russell. He pretended that he had never been enrolled in a militia regiment when in fact he had. He must have known the course of enlistment, that this question would be asked him, and that he would not be accepted at once and obtain the money if he

answered it truly ; and, indeed, the Court must now assume, that the statement was made fraudulently, and with a view to obtain the money, and that the money was obtained thereby, as the jury have found the prisoner guilty. The Court will also assume that the case was properly left to the jury, and on these grounds, that there is sufficient to justify the conviction on the second and third counts.

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POLLOCK C. B.—We are really not in a condition to discuss the question. We are asked whether the prisoner has been rightly convicted of obtaining money by false pretences. He may or may not have been properly convicted. There is not enough stated in the case to enable us to say that the conviction was right, and therefore the conviction must be quashed.

CRESSWELL J.—It is sufficient to say that there is not enough appearing upon the case to sustain a conviction upon the second and third counts.

The other learned Judges concurred.

Conviction quashed.

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REGINA v. JOHN MOAH.

The prisoner was convicted on an indictment under section 1 of the 2 Wm. 4. c. 4. The indictment alleged that the prisoner being in the public service and entrusted by virtue of his employment with the receipt and custody of certain money, the property of the Queen, to wit to the amount of 5,000*l.*, fraudulently and

THE following case was reserved for the opinion of the Court of Criminal Appeal by Mr. Justice CRESSWELL.

The prisoner was tried before me at the last *Chester* gaol delivery on an indictment which contained two counts. The second, upon which alone he was found guilty, was as follows: "And the jurors aforesaid upon their oath aforesaid do further present that the said *John Moah* afterwards and within six calendar months from the time of committing the said offence in the first count of this indictment mentioned to wit on the 13th day of *September* in the year aforesaid being then employed in the public service of our Lady the Queen and entrusted by virtue of such employment with the receipt and custody of money

feloniously applied the same to his own use and benefit, and so feloniously stole the same. By the evidence it appeared that he was an officer of Inland Revenue, and received certain taxes in respect of which he was allowed to retain in his hands a balance of about 300*l.* to meet contingent expenses, that it was his duty to render accounts to certain inspectors, and that these accounts when rendered shewed a much larger balance in his hands than he was allowed to retain. That at last the General Surveyor of Inland Revenue examined the prisoner's accounts, and produced to him a statement extracted from them, shewing a balance in his hands of upwards of 5,000*l.*, which he admitted. The Surveyor then asked him if he was prepared to pay over that balance or any part of it, and he said he was not. The Surveyor then reminded him that there was a balance of excise duties alone of about 300*l.* standing against him from the previous *Monday*, which was a receipt day at *T*. The prisoner then took out 255*l.* in bank notes, a check for 25*l.* 8*s.* 4*d.*, and a money order for fourteen shillings, and said that that was all the money he had in the world. The Surveyor then asked what he had done with the rest, and he said he had spent it in an unfortunate speculation. *Held*, that there was evidence of the receipt of a particular sum of 300*l.* and of a misapplication of a part of it; and that therefore there was sufficient to support the conviction.

Quære, whether evidence of a general deficiency on a balance of accounts would alone have supported the indictment? *Quære*, whether evidence of such a general deficiency is sufficient to sustain an indictment for embezzlement under 7 & 8 Geo. 4. c. 29. s. 47.?

the property of our Lady the Queen did by virtue of his said employment and whilst he was so employed as aforesaid receive and have in his possession and was entrusted with certain money the property of our said Lady the Queen to wit to the amount of 5,000*l.* for and on account of the public service of our Lady the Queen and the said money then fraudulently and feloniously did apply to his own use and benefit and so the jurors aforesaid upon their oath aforesaid do say that the said *John Moah* in manner and form aforesaid the said last mentioned money being the property of our Lady the Queen from our Lady the Queen feloniously did steal take and carry away against the form of the statute in such case made and provided and against the peace of our Lady the Queen her crown and dignity."

It was proved that the prisoner had for several years been an officer of receipts of inland revenue for the *Chester* district. In that capacity he received income tax, land and assessed taxes, and duties of excise. On each of these accounts he was allowed, by the Board of Inland Revenue, to retain in his hands a balance of 100*l.* to meet contingent expences. There were two inspectors of taxes for different portions of the prisoner's district, and it was his duty to send them returns shewing the amounts received and remitted by him, and the balance remaining in his hands, according to the accounts so rendered by the prisoner. In the months of *July* and *August*, 1855, the balance remaining in his hands under each head much exceeded what he was allowed to retain; and in the month of *September* the balance in the whole amounted to more than 5,000*l.* On the 13th of that month the General Surveyor of Inland Revenue came to *Chester*, and after examining the prisoner's accounts had an interview with him, and produced

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to him a statement extracted from his own accounts, making the balance in his hands 5,214*l.* and a fraction. He said he knew the balance was about that sum, as he had gone through the accounts a few days before. The surveyor then asked if he was prepared to hand over that balance, or any part of it; he said he was not. The surveyor then reminded him that there was a balance of excise duties alone of about 300*l.* standing against him from the previous *Monday*, which was a receipt day, at *Tarforley*. The prisoner then took out 255*l.* in Bank of England notes, a check for 25*l.* 8*s.* 4*d.*, and a money order for 14*s.*, and said that was all the money he had in the world. The surveyor asked him what he had done with all the rest. He said he had spent it in an unfortunate speculation.

On behalf of the prisoner it was objected that inasmuch as no evidence was given on behalf of the Crown of the receipt and misapplication of any particular sums, he could not be convicted under the 2nd of *Wm. 4. c. 4.*

I would not on that ground direct an acquittal, but left the case to the jury, who found the prisoner guilty of the offence alleged in the second count; and I have now to request the opinion of this Court as to the sufficiency of the evidence to sustain that conviction? The prisoner in the meantime remains in custody.

C. CRESSWELL.

This case was argued on 26th *January*, 1856, before POLLOCK C. B., COLERIDGE J., CRESSWELL J., WILLIAMS J. and MARTIN B.

Welsby (*Davison* with him) appeared for the Crown. *Ballantine* (*Hardinge Giffard* with him) for the prisoner.

Ballantine, for the prisoner. This conviction cannot be sustained unless it can be shewn that a particular and specific sum was embezzled ; a general deficiency is no doubt proved, but that is not sufficient. Embezzlement is a statutable larceny and subject to the incidents of larceny ; true, the particular coin need not now be proved, but a specific sum must be traced to the prisoner ; and one reason why it must be so is, that he could not otherwise plead *autrefois convict* or *autrefois acquit*.

POLLOCK C. B.—The statute says, that if any person employed in the public service of his Majesty and entrusted by virtue of such employment with the receipt, custody, management, or control of any chattel, money, or valuable security, shall embezzle the same or any part thereof, or in any manner fraudulently apply or dispose of the same, or any part thereof, to his own use or benefit, he shall be deemed to have stolen the same. We may not approve of this mode of legislation, but we must deal with the law as we find it ; this is not stealing, except by virtue of the statute, which says, that if a man does so and so he shall be deemed guilty of stealing.

COLERIDGE J.—No doubt embezzlement is a statutable larceny ; but it wants some of the incidents of larceny ; it is a taking of something which has never been in the possession of the prosecutor. This offence is the creature of the statute which creates it.

Ballantine. I put it broadly that notwithstanding the words deemed to steal, this is, in fact, a charge of stealing ; a larceny is, it is true, created by the statute ; but it is a larceny with and subject to all the incidents of larceny. In all cases of embezzlement the real offence charged is larceny, and the only effect of the statute 7 & 8 Geo. 4. c. 29. is to get rid of the necessity of proving one of the ingredients

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essential to larceny at common law, viz., that the property had come into the hands of the master. All the other ingredients essential to constitute larceny must exist; and one is, that larceny must be committed of something tangible, some chattel which is capable of being taken and carried away. A man cannot steal that which is merely imaginary—a mental result from a certain combination of figures. But for the statutory provisions which have rendered it unnecessary (*a*), it would be necessary to shew a misapplication of a particular coin.

COLERIDGE J.—The case finds that the prisoner was reminded that there was a balance of excise duties alone of about 300*l.* standing against him from the previous *Monday*, which was a receipt day at *Tarforley*, and that he then produced 255*l.*, and said that that was all he had in the world, and that he had spent the rest in an unfortunate speculation. Does not that shew that he had misapplied, at all events, some part of a sum of 300*l.* received by him on a given day?

Ballantine. I contend that it does not. The difference between the 255*l.* and the 300*l.* would consist of numerous items received from different people, and the prisoner was entitled to retain 100*l.* to meet contingent expenses. It is impossible to point to any particular transaction of receipt and misapplication; and if evidence of a general deficiency were held to be sufficient, the prisoner would be deprived of the benefit of a plea of *autrefois convict* or *autrefois acquit*.

CRESSWELL J.—If he has once been convicted of the whole he could not again be convicted of any

(*a*) 7 & 8 Geo. 4. c. 29. s. 48.; 2 Wm. 4. c. 4. s. 3.; 14 & 15 Vict. c. 100. s. 18.

part; if indicted, he could readily prove that the specific sum formed part of the larger sum.

Ballantine. A general deficiency may represent any indefinite number of distinct embezzlements, and the law will not permit a man to be put upon his trial for a number of different offences at the same time. Until enabled to do so by statute, you could not include more than one charge in the indictment; at the common law this could not be done.

POLLOCK C. B.—There was nothing in the common law to prevent it. I know of nothing in the common law to prevent all the prisoners being tried on one indictment, or any number of charges against one prisoner being included in one indictment; it is only by the practice of judges that these rules have been established to prevent a man being embarrassed in his defence.

Ballantine. If a rule of practice only, it was an inveterate and well-established rule which required an act of Parliament to alter it. Recognising and acting upon that rule, section 48 of 7 & 8 Geo. 4. c. 29. enacts that any number of distinct acts of embezzlement, not exceeding three, which may have been committed within six calendar months may be included in one indictment. Section 3 of 2 Wm. 4. c. 4. contains a similar provision; and, by section 16 of 14 & 15 Vict. c. 100. similar provision is made in cases of larceny.

COLERIDGE J.—Suppose the prisoner had received various sums of money from many different persons, and had put them all together in a bag, without any means of afterwards distinguishing them. If he takes out of the bag less than the whole, do you say he could not be convicted?

Ballantine. Yes; because it would be impossible to say what particular sum he had embezzled.

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CRESSWELL J.—Suppose the prisoner had received from a thousand different people, on different days, different sums amounting in the aggregate to 5,000*l.*, and he paid the whole on a certain day into his bankers, having then there 1,000*l.* of his own money, and he then misappropriated the money he had so received by drawing checks, exhausting the entire amount at his bankers, so that it would be impossible to say out of whose money any particular check was paid. Would he not be indictable?

Ballantine. In this case the total receipts are much larger than the amount of defalcation, and there is no evidence applicable to any particular sum, which is, I contend, necessary.

In *Rex v. Grove* (a) it appears to have been decided, by eight judges to seven (b), that an indictment for embezzlement may be supported, since 7 & 8 Geo. 4. c. 29. s. 48., by proof of a general deficiency of moneys that ought to be forthcoming, without shewing any particular sum received and not accounted for; but *Park J.*, in delivering judgment, says (c) that the majority of the judges were of opinion that there was sufficient evidence to go to the jury of the prisoner having received certain moneys on a particular day, and for them to find that the prisoner did embezzle the sum mentioned in the indictment. *Park J.* was one of the judges who held the conviction right, and therefore must have known the reasons on which the judgment proceeded.

CRESSWELL J.—The case expressly finds that there

(a) 1 Mood. C. C. 447. S. C. 7 Car. & P. 635.

(b) The Judges who were of opinion that the conviction was good, were Lord Denman C. J., Tindal C. J., Lord Abinger C. B., Park J., Vaughan B., Bosanquet J.,

Gurney B. and Williams J.; while Littledale J., Gaselee J., Parke B., Bolland B., Alderson B., Patteson J. and Coleridge J. were of the contrary opinion.

(c) 7 Car. & P. 640.

was no evidence when the money or any part of it had been purloined, from whom it had been received, what sort of money had been abstracted, and whether from the till or upon its receipt from customers, and we must construe the judgment according to the case.

Ballantine. That case has not been generally acted upon since.

CRESSWELL J.—It was acted upon by my brother ERLE in *Reg. v. Lambert* (a).

Ballantine. It was previously considered in *Reg. v. Lloyd Jones* (b), in which ALDERSON B. held that it was not sufficient to prove a general deficiency in account, but that some specific sum must be proved to be embezzled in like manner, as in larceny, some particular article must be proved to have been stolen; and the learned Baron said that whatever difference of opinion there might be in the case of *Rex v. Grove*, it proceeded more upon the peculiar facts of that case than upon the law.

In *Reg. v. Chapman* (c), WILLIAMS J. said to the prosecuting Counsel, “can you shew any precise sum received by the prisoner on account of his master, and the whole or part of that very sum appropriated by him to his own use?” And on receiving an answer in the negative, he held that in the absence of such evidence the prosecution could not be sustained, and WILLIAMS J. it must be remembered was one of the Judges who were in the majority in *Rex v. Grove*, and the one who tried *Grove*, and yet we find him laying down a proposition contrary to the principle on which the judgment in that case is supposed to proceed. I therefore contend that upon principle and authority, an ordinary indictment for

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(a) 2 Cox C. C. 309.

(b) 8 Car. & P. 288.

(c) 1 Car. & Kir. 119.

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embezzlement cannot be sustained, without proof of the receipt of some particular sum of money, and of the misappropriation thereof, or of some part of it, and I also contend that the same proof is equally necessary on an indictment under this particular statute.

CRESSWELL J.—The words of this statute are more comprehensive than those in sect. 47 of 7 & 8 *Geo. 4.* c. 29. s. 47. It is difficult to avoid the effect of the words, that if any person having the “management or control” of any money shall “in any manner fraudulently apply or dispose of the same or any part thereof to his own use,” he shall be deemed to have stolen the same.

Ballantine. I contend that there is no substantial distinction between the two statutes. I call attention to the words of sect. 42 of the 7 & 8 *Geo. 4.* c. 29., “if any clerk or servant or any person employed in the capacity of a clerk or servant, shall by virtue of his employment receive or take into his possession any chattel, money, or valuable security, for or in the name or on the account of his master, and shall fraudulently embezzle the same or any part thereof, every such offender shall be deemed to have feloniously stolen the same.”

Now take the words in this statute: “That from and after the passing of this act, if any person employed in the public service of his Majesty, and entrusted by virtue of such employment with the receipt, custody, management or control of any chattel, money, or valuable security, shall embezzle the same or any part thereof, or in any manner fraudulently apply or dispose of the same or any part thereof to his own use or benefit, or for any purpose whatsoever, except for the public service, every such offender shall be deemed to have stolen the same.”

These are in substance the same enactments. The words "management and control" were intended to apply to the case where, without any actual receipt, there is such a control as to enable a man to take the money into his possession whenever he pleases; and the words "fraudulently apply or dispose of," were probably introduced to meet the difficulty arising from the cases in which it had been held that there must be a denial of the receipt of the money, or some false account in order to constitute embezzlement. At all events there is no such difference between the two enactments, as to prevent the necessity for proving the misapplication of some specific sum, as in a case of ordinary embezzlement.

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Welsby, for the Crown. The statute says, that if certain things concur, the person with respect to whom they concur shall be deemed guilty of larceny. They are : 1. The person charged must be a person employed in the public service of her Majesty ; and it is admitted that the prisoner was so employed. 2. He must have been entrusted by virtue of such employment with the receipt, custody, management or control of some chattel, money, or valuable security; and no doubt the prisoner was so entrusted. 3. He must either embezzle the same or some part thereof, or fraudulently apply or dispose of the same, or some part thereof, to his own use or benefit, or for some purpose other than for the public service.

The jury have found that the prisoner did fraudulently apply to his own use a sum of 5,000*l.* or part thereof; and there was sufficient evidence to support that finding.

[He was stopped by the Court.]

POLLOCK C. B.—We are all of opinion that whatever difficulty there may be as to the larger sum, there is none as to the 300*l.*, and that the evidence

1856. with respect to that sum clearly brings the case within the statute. As to that, the case finds that after some conversation about the amount of the general balance against the prisoner, the surveyor then reminded him that there was a balance of excise duties alone of about 300*l.* standing against him from the previous *Monday*, which was a receipt day, at *Tarforley*; that the prisoner then took out 255*l.* in Bank of England notes, a check for 25*l.* 8*s.* 4*d.*, and a money order for 14*s.*, and said that that was all the money he had in the world; that the surveyor then asked him what he had done with all the rest, and he replied that he had spent it in an unfortunate speculation;—which amounts to this, that he had received a certain sum on account of the Crown, and had spent it in an unfortunate speculation. That evidence brings the case within the statute. The object of the statute was to give the utmost possible facility to the punishment of persons in the employment of the Crown who were guilty of fraudulently appropriating money belonging to the Crown, with which they are entrusted. This is the enactment on which this indictment is framed.
[The learned Judge here read the words of section 1 of 2 *Wm. 4. c. 4.*]

The very long and learned argument of Mr. *Ballantine* as to the law of embezzlement does not apply to this case; because, upon the language of this particular statute, if any person employed in the service of the Crown shall embezzle, or in any manner fraudulently misapply money of the Crown, with the control of which he has been entrusted, he shall be deemed to have stolen the same. Whenever that is the case you may simply charge him with stealing, and on giving in evidence the acts done which are necessary to bring him within the operation of the statute, you prove that the offence contemplated by the statute has been committed.

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It may be inconvenient to call one thing by the name of another; and I cannot say that I particularly approve of that mode of legislation; but the law has chosen to say that if certain things occur the offender shall be deemed guilty of stealing, and we must give effect to the plain meaning of the words of the enactment, and see whether the facts proved make out the substance of the offence charged, which consists in the abuse of the public trust by the misappropriation of the public money. In this case I think they do. The prisoner here, at all events, on his own statement, received 300*l.* on a particular occasion, and applied a portion of that money to his own use, namely, to an unfortunate speculation of his own. That is sufficient completely to make out the offence contemplated by the statute, and the conviction must be affirmed.

1856.

MOAH'S
Case.

COLERIDGE J.—I am of the same opinion; but I do not wish it to be supposed that I agree with all that has been said by the prisoner's Counsel in the course of his argument as to the general question. The count on which the conviction proceeds is, I think, abundantly proved by the evidence. That count, after stating what the statute requires as to the employment of the prisoner in the public service, and his being, by virtue of such employment, entrusted with the public money, alleges that he did fraudulently and feloniously apply the same to his own use, and then draws the conclusion which the statute warrants, namely, that he thereby stole the money. It is proved, out of the prisoner's own mouth, that he had received, no matter from how many different persons, various sums, amounting to 300*l.* at the least, which formed a fund in his hands belonging to the Crown, for which he was bound to account; and the question is, whether he has fraudulently applied all or any

1856.
MOAH'S
Case.

part of it. He himself produces a sum of money, 255*l.*, and says, I have expended "the rest" in unfortunate speculations. It is not material whether that sum of 255*l.* was part of the 300*l.* or not, because "the rest," which must include part or all of the 300*l.*, he had, according to his own statement, expended in an unfortunate speculation. It is the same as if he had received the 300*l.* in a bag, and, part of the money being gone, he had said, I have disposed of the sum wanting for my own benefit. If that would not be evidence of a receipt of a particular sum, by virtue of his employment, and a fraudulent appropriation of some part of that sum, I do not know what would be.

CRESSWELL J.—I am also of opinion that the conviction must be sustained as to the 300*l.* I by no means say, that it is not sustainable as to the 5,000*l.* It is a question of law of great importance, and the authorities are somewhat conflicting. In *Rex v. Grove*, under circumstances somewhat similar, the conviction was sustained by a majority of eight judges to seven; but in a subsequent case that decision was not followed, and was said to have proceeded upon some special facts. In *Reg. v. Lambert*, however, which cannot be distinguished from this case, my brother ERLE held that evidence of a general deficiency was sufficient to sustain the indictment. As at present advised, I should say that the prisoner, being shewn by his own accounts to have a balance in hand of 5,000*l.* due to the Crown, and he making no attempt to explain it on the ground of error or loss of the money, merely says, that he has expended it for his own purposes, he may upon that evidence be convicted of embezzling the money, and that, having been once indicted for embezzling the whole amount, and either convicted or acquitted, he never could be

indicted again for embezzling any part of it. I merely throw this out as shewing my grounds for saying, that I am by no means satisfied that this indictment is not sustainable as to the whole amount of the prisoner's deficiency.

WILLIAMS J.—I am also of opinion that this conviction must be affirmed. We are enabled to dispose of this case on narrow grounds; but I was anxious that the major question, whether *Rex v. Grove* is law, should have been decided. However, as to the 300*l.*, it appears that the prisoner was entrusted with the receipt and custody of that sum on behalf of the Crown, and that he fraudulently applied part of it to his own use. There is, therefore, a specific transaction pointed at, as to which the conviction is clearly sustained.

MARTIN B.—This is an indictment framed on an act of Parliament, and we must read the statute and ascertain its meaning. I protest against the idea that when an act of Parliament is made as clear as words can make it, you are to cite as authorities as to its construction, and as a guide to us in its interpretation, cases decided years and years before upon another statute. The section in question says, that if any person in the employment of the Crown is entrusted by virtue of such employment with the receipt, custody, management, or control of money, and shall embezzle or fraudulently apply or dispose of the same, or any part thereof, to his own use or benefit, he shall be deemed to have stolen the same. It is admitted that the prisoner was in the employment of the Crown, and did receive the moneys by virtue of such employment. Then did he apply or dispose of part of such moneys to his own use or benefit? His own statement is conclusive that he did. The case is clearly within the act of Parliament, and if there is

1856.

MoAH's
Case.

1856. anything in the cases decided previously inconsistent with that conclusion, then I should say that the legislature intended by the provisions of this statute to get rid of the effect of those decisions.

MOAH'S
Case.

Conviction affirmed.

1856. REGINA v. JOHN DAVIES, *alias* RUSH, and WILLIAM DAVIES.

The prisoners were convicted of stealing a post-office order. It appeared by the evidence that a post letter, containing a post-office order, directed to *J. D.*, was misdelivered to *J. D.*, one of the prisoners who could not read, and he took it to *W. D.*, the other prisoner, who read it for him. Upon hearing it read, *J. D.* said that the letter and order were not for him; but *W. D.*

THE following case was reserved for the opinion of the Court of Criminal Appeal, by Mr. Justice ERLE, at the *Montgomeryshire* Spring Assizes at *Welshpool*, 1856.

The prisoners were convicted of stealing a post-office order, laid, in the first count, to be the property of the Postmaster General, and in the second count, that of *William Davies*. The jury must be taken to have found the following facts, viz.: *William Davies*, of *Bishops' Castle*, put the post-office order in a letter into the Post Office there for his son, having directed it to him thus: “*John Davies*,

“*Pack Horse Inn,*
“*Welshpool.*”

In *Welshpool* there were two Inns of that name, called *The Upper* and *The Lower Pack Horse*; at the Lower, *John Davies*, the son was living; at the Upper, *John Rush*, the prisoner, who had enlisted in

advised him to keep them and get the money, and both the prisoners accordingly applied at the post-office and obtained the money, and appropriated it to their own use. Held, that the conviction was wrong.

the militia as *John Davies*, and was known by that name only in *Welshpool*, was billeted, and the letter was delivered for him there from the *Welshpool* post-office. He could not read, and took the letter to the other prisoner *William Davies*, also billeted in *Welshpool*, who read it to him. *John Davies* then told him that the letter and order were not intended for him, and *William Davies* advised him, notwithstanding to keep them and get the money, and this they both immediately did by applying to the post-office in the ordinary way. I told the jury that if at the time the prisoners received the order, they knew it was not the property of *John Davies* the prisoner, but the property of another person of known name and address, and nevertheless determined to appropriate it wrongfully to their own use they were guilty of larceny, and that in my opinion they had not received it until they had discovered, by opening and reading the letter, whether it belonged to *John Davies* the prisoner or not.

1856.

DAVIES'S
Case.

I considered that the law of larceny laid down in respect of articles found, was applicable to the article here in question. In respect of those articles the finder is guilty if, after he has ascertained what the article is and what are the marks of ownership, he determines to appropriate it wrongfully to himself; and so, in respect of an article enclosed in a misdelivered letter, the question of wrongful appropriation cannot arise until it has been ascertained whether the letter has been misdelivered or not. I ruled as above stated, but when I did so my attention had not been called to *R. v. James Muchlow*, 1 Moo. C. C. 100, and on reading it I reserved the point whether upon these facts and this ruling the conviction was lawful.

The prisoners were sentenced, one to three months and the other to six months' imprisonment with hard

1856. labour, and they were ordered to be kept in the prison until the case should be determined.

DAVIES'S
Case.

W. ERLE.

This case was considered on 26th April 1856, by JERVIS C. J., COLERIDGE J., CRESSWELL J., ERLE J. and MARTIN B.

No Counsel appeared either for the Crown or for the prisoner.

JERVIS C. J.—This case is governed by the case of *Rex v. Mucklow*, 1 Moo. C. C. 160. The conviction therefore must be quashed.

The other learned Judges concurred.

Conviction quashed.

1856.

REGINA v. JOHN LANGTON LEECH.

The prisoner was convicted of obtaining money by false pretences, the venue being laid in the county of the borough of C. It was proved that the pri-

THE following case was reserved for the opinion of the Court of Criminal Appeal by the Recorder of Carmarthen.

At the Epiphany Quarter Sessions held for the county of the borough of Carmarthen (being a court of separate jurisdiction from that of the county of

of C., received there the money obtained by it, which money was sent to him by the prosecutor in a registered letter. The letter containing the false pretence was received by the prosecutor in the county of the borough of C., and the registered letter containing the money was posted in the county of the borough of C. Held, that the venue was properly laid.

Carmarthen), in 1856, *John Langton Leech* was tried for and convicted of obtaining money by false pretences.

1856.
LEECH'S
Case.

After the case for the prosecution had closed, but before the verdict was delivered, the advocate for the prisoner objected that the venue was not properly laid in the county of the borough of *Carmarthen*, and that the prisoner was not indictable there.

The following evidence as applicable to the objection was given.

The prosecutor, *John Matthews*, is the postmaster of *Carmarthen*, and was so at the time the offence was committed by the prisoner.

The prisoner was, in *May* last, when the offence was committed, an officer in the department of the General Post Office, acting as assistant surveyor of the *South Wales* district, and on duty at *Newcastle Emlyn*, in the county of *Carmarthen*.

On the 23rd of *April*, 1855, the prisoner wrote the following letter to the prosecutor.

“ Dear Sir. Will you kindly send me 12*l.*, and I will give you a warrant at the end of the month.

“ Yours faithfully,

(Signed) “ *John L. Leech.*”

It appeared that the authorities of the General Post Office were in the habit of paying their officers by means of money orders which are called “ warrants.”

It appears by the following receipt for a registered letter that the prisoner received the 12*l.* which he required :

“ 12*l.* Received this 24th day of *April*, 1855, of the postmaster of *Newcastle Emlyn*, a registered letter addressed to *John L. Leech*, Esq., P.O., *Newcastle Emlyn*.

(Signed) “ *John L. Leech.*”

On the 2nd of *May*, 1855, the following letter was

1856. received by the prosecutor from the prisoner; it bore no date.

LEECH'S
Case.

" My dear Sir. I have got a warrant for 32*l.* 11*s.* 6*d.* Will you please send me the difference between 12*l.*, which I have had, and I will send you the warrant, or bring it myself.

" I will send you instructions to-morrow about the change at *Cenarth Kilkerran*.

" Yours faithfully,

(Signed) " *John L. Leech.*"

In compliance with the request of the prisoner, the prosecutor sent to the prisoner by post, in a registered letter, posted at *Carmarthen* within the county of the borough of *Carmarthen*, 20*l.* 11*s.* 6*d.* being the difference between the 12*l.*, previously sent by the prosecutor to the prisoner, and the 32*l.* 11*s.* 6*d.* for which the prisoner alleged in his letter he had a warrant.

By the following receipt for the registered letter, it was proved that the 20*l.* 11*s.* 6*d.* was received by the prisoner at *Newcastle Emlyn*, in the county of *Carmarthen*. " 20*l.* 11*s.* 6*d.* Received this 3rd day of *May*, 1855, of the Postmaster of *Newcastle Emlyn*, a registered letter addressed to *John L. Leech, Esq., P. O., Newcastle Emlyn*.

(Signed) " *John L. Leech.*"

In each receipt for the registered letter the amount contained in the letter was inserted in the receipt, for the protection of the prosecutor.

The following letter was addressed to the prosecutor by the prisoner, which, amongst other matters referring to the business of the Post Office, contains the following paragraph:—

" *Gloucester, 10th May, 1855.*

" My Dear Sir,

" I will send you the warrant for 32*l.* 11*s.* 6*d.*

in the course of 3 or 4 days. I was obliged to return it to *London* for correction."

1856.

LEECH's
Case.

It was proved that the prisoner had not, on the 2nd of *May*, 1855, or at any period between that day and the 25th of *May*, 1855, any warrant for 32*l.* 11*s.* 6*d.*, or for any other sum; and that the prosecutor had not, between the 2nd of *May*, 1855, and the day on which the prisoner was tried, received from the prisoner any such warrant, or the sum of 20*l.* 11*s.* 6*d.* received by the prisoner on the 3rd of *May*, 1855.

The false pretence of which the prisoner was convicted, is the statement in the prisoner's letter written at *Newcastle Emlyn*, in the county of *Carmarthen*, and received by the prosecutor in the county of the borough of *Carmarthen*, on the 2nd day of *May*, 1855.

The money which the prisoner was convicted of obtaining by such false pretence was the 20*l.* 11*s.* 6*d.* posted in a registered letter in the county of the borough of *Carmarthen*, and received by the prisoner at *Newcastle Emlyn*, in the county of *Carmarthen*, on the 3rd of *May*, 1855. The advocate for the prisoner urged that the false pretence was not made, nor the money obtained by the false pretence paid, in the county of the borough of *Carmarthen*, and that the Court of Quarter Sessions for that borough had therefore no jurisdiction to try the prisoner.

I thought the Court had jurisdiction to try the prisoner, but at the request of the advocate for the defence, I thought it advisable to request your Lordships' opinion whether, having regard to the facts above set forth, the venue was properly laid in the county of the borough of *Carmarthen*.

This case was argued on 26th *April*, 1856, before

1856. JERVIS C. J., COLERIDGE J., CRESSWELL J., ERLE J.,
and MARTIN B.

LEECH'S
Case.

Bowen appeared for the Crown; no Counsel appeared for the prisoner.

Bowen for the Crown. In *Reg. v. Jones* (a) it was decided that where money, obtained by false pretences, reached the prisoner in the county of *B.*, but had been transmitted to him in a letter posted at his request in the county of *A.*, he was triable in *A.*, independently of the statute 7 Geo. 4. c. 64. s. 12., which enacts, that "if any felony or misdemeanor shall be begun in one county and completed in another, such felony or misdemeanor may be dealt with, inquired of, tried, determined, and punished in any of the said counties in the same manner as if it had been actually and wholly committed therein." In *Reg. v. Jones*, ALDERSON B. observed, that the postmaster who received the letter became the agent of the prisoner, who must thus be taken to have himself received it in the county in which it was posted.

JERVIS C. J.—The offence charged consists of the making of the false pretence, and obtaining money by means of such false pretence. That offence was committed by the prisoner partly in one county and partly in another. That is sufficient. The case comes within the statute, and the conviction must be affirmed.

The other learned Judges concurred.

Conviction affirmed.

REGINA v. JOSEPH TOPPING.

1856.

THE following case was reserved for the opinion of the Court of Criminal Appeal, by Mr. Baron MARTIN, at the *Carlisle* Spring Assizes, 1856.

I request the opinion of the Court of Criminal Appeal upon the following case. On the 2nd of February, 1849, the prisoner, *Joseph Topping*, a subject of her Majesty, who was at that time usually resident at *Carlisle*, married in *Scotland*, and according to the law of *Scotland*, *Anne Ashton*, then also in like manner resident in *Carlisle*.

On the 25th November, 1854, *Anne Ashton* being alive, the prisoner, who continued resident at *Carlisle*, married in *Scotland*, and according to the law of *Scotland*, *Jane Lister*, then also usually resident at *Carlisle*.

Question. Has the prisoner committed an offence against the statute 9 Geo. 4. c. 31. s. 22.?

* SAMUEL MARTIN,

14th April, 1856.

The prisoner, a British subject resident in England, married in Scotland, according to the law of Scotland, a woman resident in England, and while she was alive married in Scotland, according to the law of Scotland, another woman resident in England. Held, that he was properly convicted of bigamy in England under section 22 of 9 Geo. 4. c. 31.

This case was considered on 26th April, 1856, by JERVIS C. J., WIGHTMAN J., CRESSWELL J., ERLE J. and MARTIN B.

No Counsel appeared either for the Crown or for the prisoner.

JERVIS C. J.—We are clearly of opinion that the offence of bigamy was complete within the statute. The prisoner married a woman in *Scotland*. He afterwards contracted a second marriage in *Scotland* during the life of his first wife. At the time of his

1856. second marriage therefore he was a person married.
 TOPPING'S Case. It is found in the case that he was a *British* subject at the time of the second marriage, and the second marriage therefore, although it took place in *Scotland*, was clearly an offence within the statute, which says: that "nothing herein contained shall extend to any second marriage contracted out of *England* by any other than a subject of his Majesty."

The other learned Judges concurred.

Conviction affirmed.

1856.

REGINA v. MARY ANN STRIPP.

Section 18 of
11 & 12 Vict.
c. 42., which
requires a
caution to be
given to the
prisoner by
the justice
before whom
he is examin-
ed, applies
only to the
concluding
examination
before the
committing
magistrate,
when all the
witnesses
have been ex-
amined; and,

therefore, a voluntary statement made by a prisoner in the course of an examination before a magistrate, and before all the witnesses have been examined, is admissible in evidence at the trial, although no caution has been previously given.

THE following case was reserved for the opinion of the Court of Criminal Appeal by the Chairman of the Quarter Sessions holden at *Reigate* in and for the county of *Surrey*.

At the general quarter sessions of the peace of our Sovereign Lady the Queen holden at *Reigate* in and for the county of *Surrey*, on *Tuesday*, the eighth day of *April*, in the year of our Lord, one thousand eight hundred and fifty-six, *Mary Ann Stripp* was tried and convicted of stealing from her master upwards of five pounds, in the dwelling-house of her said master, and was thereupon sentenced to one calendar month hard

labour; but execution of such sentence was respite until the opinion of the Justices of either bench, and Barons of the Exchequer, should be given on the following point. Amongst the other articles which were proved to be so stolen was a cash-box containing upwards of five pounds in money, the property of the prisoner's master. This cash-box bore the marks of having been opened with violence. It was in the possession of a superintendent of police, who, being desirous of making a further search before the examination of the several witnesses at petty sessions, took the prisoner before a magistrate, and applied to have her remanded to enable him to make his intended search. In support of his application for a remand the superintendent produced the cash-box and an iron chisel, stating his belief that it was with that instrument the prisoner had opened the box; upon which the prisoner, spontaneously, and without any question having been put to her, said that she had not opened the box by means of the chisel, but by a hammer. No examination whatever was taken by or before the magistrate above referred to, who merely granted a remand; but it will be seen by the deposition which follows that what passed on the application for the remand was given in evidence before the committing magistrates, and was taken down in writing as part of the deposition of the superintendent. This deponent, *William Henry Biddlecomb*, on his oath saith as follows:—“On Thursday last, the twentieth of March, from information I had received of the robbery, I went to the prosecutor's house, accompanied by Inspector *Murtell*. I commenced my inquiry, and first of all ascertained the number of persons in the house on the Monday. My suspicions having been directed to the prisoner I directed the inspector to make a minute search on the outside of

1856.

STRIPP'S
Case.

1856.

STRIPP'S
Case.

the premises while I commenced searching the inside. From something that occurred during the search, I felt it necessary to go to *Thames Ditton*, the residence of the prisoner's mother, and I there apprehended the prisoner. I asked her for her purse and money; she said, My mother has put it in her box; her mother was not at home, but the lodger opened the box for me. I there found thirty shillings in silver and fifteen pounds ten shillings in gold. On my way from *Esher* to *Weybridge* the prisoner cried and said, She wished to see her mother. On the *Saturday*, from something *Moore* told me, I went to the cell in which the prisoner was confined. I said to her, I find you have made a statement to the officer; I am going to take you to a magistrate. She said, You will find the money in the mill pond; I threw it in because I thought the policeman suspected me when he came on the *Wednesday*. I threw away the *Hanover* coin and the half guinea because it was not good. On the previous day (*Good Friday*) I had seen her in her cell; I told her her mother was coming to see her, but that I must give her this caution—that whatever she said to me, or any one connected with the station, would be related to the magistrates, and used as evidence against her. Her reply was, I hope mother will come. On *Saturday* I placed her before Mr. *Back*, and asked for a remand; she stated to Mr. *Back* that she had thrown the money into the mill pond, and placed the cash-box in the coal-cellars. I produced a hammer and a chisel before Mr. *Back*, and said, I believe the instrument (a chisel) now produced was used in breaking the cash-box. She said, No, I did it with the chopper. When I apprehended the prisoner and told her the charge, she said, I know nothing about it."

At the proceedings before the committing magis-

trates the charge was read to the said prisoner, and the several witnesses for the prosecution were examined in her presence. The prisoner, after the usual caution, was asked if she wished to say anything in answer to the charge, whereupon she said, "I am not guilty. The things which are now produced were not found in my box when it was first searched by Mrs. Holroyd."

The depositions and statement of the prisoner above mentioned were produced at the trial, and the superintendent above referred to was examined, and gave the same statement as contained in his deposition, including the voluntary admission made by the prisoner before the magistrate, first above mentioned on the application for a remand; but the witness stated that the magistrate's clerk, who took down his evidence, had erroneously used the term "hammer" instead of "chopper."

The Counsel for the prisoner objected that the statement of the prisoner in the presence of the remanding magistrate was not receivable in evidence at the trial, not having been then taken down in writing with the previous caution required by statute.

The Court held, that no examination whatever having been committed to writing on the application for a remand, but merely a statement being made by the officer as the reason for such application, the voluntary interruption of the prisoner at the moment was not governed by the rules relating to a statement made by a prisoner at the close of an examination before the committing magistrates, and the jury were directed that they might take into consideration the evidence of the witness of what passed before the magistrate on the application for the remand, including the statement then voluntarily made by the prisoner.

1856.

STRIPP'S
Case.

1856. The jury thereupon convicted the prisoner, and,

**STRIPP'S
Case.** upon the application of the prisoner's Counsel, the Court reserved, for the decision of the justices of either Bench and Barons of the Exchequer, the question, whether the voluntary statement of the prisoner, in the presence of the remanding magistrate, the same not having been then committed to writing, after the caution required by the statute had been previously given, was properly received in evidence at the trial?

J. W. Freshfield,
Chairman of Quarter Sessions.

This case was considered on 26th *April*, 1856, by JERVIS C. J., WIGHTMAN J., CRESSWELL J., ERLE J. and MARTIN B.

No Counsel appeared either for the Crown or for the prisoner.

JERVIS C. J.—The question in this case is, whether the statement of the prisoner was inadmissible against her on account of her not having been cautioned by the magistrate before she made it. Section 18 of 11 & 12 Vict. c. 42., which requires that a prisoner shall be cautioned, in order to render what he says admissible in evidence against him, is only intended to apply to the concluding examination before the committing magistrate, after all the witnesses have been examined, and does not apply to a voluntary statement made by a prisoner in the course of the examination, and before the conclusion of the case for the prosecution. Such a statement is admissible, and it is immaterial whether it was made before, during, or after a remand.

Conviction affirmed.

REGINA v. JOB BULLOCK AND JOSEPH CLARK.

1856.

THE following case was reserved for the opinion of the Court of Criminal Appeal by the Chairman of the Quarter Sessions for the county of Wilts.

At the General Quarter Sessions of the Peace for the county of Wilts, holden at *Devizes* in the said county, the 1st day of *January*, 1856, before her Majesty's justices of the peace for the same county, *Job Bullock* and *Joseph Clark* were indicted for conspiring and attempting to cheat one *John Gaisford*. The first count of the indictment charged that the prisoners, "wickedly devising and intending to defraud one *John Gaisford*, did between and amongst themselves unlawfully conspire, combine, confederate and agree together, falsely and fraudulently to cheat and defraud the said *John Gaisford* of a certain large sum of money, to wit twenty pounds;" and divers overt acts were then stated in the said first count. The second count charged that the prisoners did unlawfully conspire, combine, confederate and agree together, by divers false and fraudulent pretences and subtle means and devices, to obtain from the said *John Gaisford* a large sum of money, to wit twenty pounds, and to cheat and defraud him thereof, to the

attempt, by false pretences, to obtain "from the said *J. G.* the sum of 20*l.*, with intent to defraud." The fifth and last count charged that the prisoners, by false pretences, did attempt to steal "from the said *J. G.* a large sum of money, to wit 20*l.* of the monies of the said *J. G.*" The prisoners were found guilty, and judgment was passed on each count of the indictment. The prisoners were convicted on all the counts, and were sentenced to distinct punishment on each. *Held*, that the fifth and last was a good count, and that the conviction must therefore be affirmed. *Semble*, that the first four counts were not good.

1856. great damage of the said *John Gaisford*." The third
BULLOCK's Case. count, that they did "unlawfully conspire, combine, confederate and agree together, by divers false and fraudulent pretences, feloniously to steal, take and carry away of and from the said *John Gaisford* a large sum of money, to wit twenty pounds, to the great damage of the said *John Gaisford*."

The fourth count, after setting forth divers false pretences made by the prisoners, proceeded as follows: "By means of which said false pretences the said *Job Bullock* and *Joseph Clark* did then unlawfully attempt and endeavour to obtain from the said *John Gaisford* the sum of twenty pounds, with intent to defraud." The fifth and last count charged that the prisoners, by "divers false and fraudulent pretences, unlawfully, knowingly, and designedly did attempt and endeavour feloniously to steal, take and carry away of and from the said *John Gaisford* a large sum of money, to wit, the sum of twenty pounds, of the monies of the said *John Gaisford*." It was objected at the trial, on behalf of the prisoners, that all the above counts were bad, and *Sill v. Regina*, 22 Law J. M. C. 41 (a), and *Regina v. Marsh*, 19 Ibid. 12, were cited by the prisoner's Counsel in support of the objection. The Court thought it right to allow the case to proceed; and it being proved, to the satisfaction of the Court and jury, that the prisoners had, by a concerted scheme, endeavoured to cheat the said *John Gaisford* of twenty pounds, by passing to him four five-pound cancelled notes in exchange for his monies to the same amount, the jury found the prisoners guilty upon each count of the indictment, and the prisoners were respectively sentenced to one year's imprisonment and hard labour,

and they are now in prison under this sentence, and judgment was passed on each count of the indictment, the sentence of hard labour being confined to such counts respectively as charged a conspiracy, so that if either of the counts be good the sentence will take effect to the extent to which it was passed on such count.

The Court reserved this case for the opinion of the Criminal Court of Appeal, and the question is, whether the objection made to the form of the indictment can be sustained ?

J. W. Audry, Chairman.

This case was considered on 26th April, 1856, by JERVIS C. J., WIGHTMAN J., CRESSWELL J., ERLE J. and MARTIN B.

No Counsel appeared either for the Crown or for the prisoners.

JERVIS C. J.—The prisoners have been convicted on all the counts and sentenced on each; therefore if any count is good the objection substantially fails. The last count is clearly good. It does contain the name of the person whose money the prisoners are charged with attempting to steal, and is therefore free from the objection in *Reg. v. Sills*.

The other learned Judges concurred.

Conviction affirmed.

1856.

BULLOCK'S
Case.

1856.

REGINA v. SAMUEL THOMAS SLOGGETT.

Where a bankrupt is examined before a commissioner in bankruptcy, touching a matter not relating to his trade dealings, or estate, and does not refuse to answer on the ground that the answer would tend to criminate him, but answers without any objection.
Held, that his answers were voluntary, and that his examination was admissible against him on a subsequent criminal charge.
Quære, whether, if the examination had been confined to matters relating to his trade dealings, or estate, such examination would not then have been compulsory and inadmissible.

THE following case was stated by Mr. Serjeant Channell for the opinion of the Court of Criminal Appeal.

Samuel Thomas Sloggett was convicted before me at the last Assizes for the county of *Devon* of unlawfully uttering a forged letter, signed "*T. F. Sloggett*," knowing it to be forged, with intent to obtain certain goods, the property of *Sampson Copestake* and others. Sentence was passed upon the prisoner, viz. imprisonment for two calendar months in the gaol of *Devonport*. He is now in prison. Before any criminal charge was made against him, the prisoner was examined in the Court of Bankruptcy for the *Exeter* District, under an adjudication in bankruptcy against the prisoner, on petition of a creditor. The prisoner, before such examination, made and signed the declaration required by the 12 & 13 Vict. c. 106. s. 117. See also section 254.

The examination was taken down in writing, in the presence of the Commissioner, and was signed by the prisoner.

In the course of the examination the prisoner was cautioned by the Commissioner to speak the truth. In a later stage of the examination the prisoner was told by the Commissioner that he was to consider himself in custody.

On the trial of the prisoner the usher of the Court of Bankruptcy was examined as a witness for the prosecution.

He produced the proceedings in bankruptcy and

the examination of the prisoner under the seal of the Court, and signed by the Commissioner.

1856.

SLOGGETT'S Case.

The witness proved that he was present when the prisoner was examined before the Commissioner, and that he could point out in the examination the part at which the prisoner was told to consider himself in custody.

It did not appear that the prisoner claimed the protection of the Commissioner, or objected to answer any question on the ground that the answer thereto would criminate or might tend to criminate him, or on any other ground.

The Counsel for the prosecution proposed to read so much of the prisoner's examination before the Commissioner as preceded the statement that the prisoner was to consider himself in custody, offering to read the whole of the examination if desired by the prisoner's Counsel.

The prisoner's Counsel objected to the reading of the examination.

I received in evidence the part of the examination which preceded the statement referred to. The prisoner's Counsel did not require the other part to be read.

A copy of so much of the examination as was read, is annexed to this case. The parties named in the indictment as *Sampson Copestake* and others, are parties who traded under the style or firm of *Growcock & Co.*, mentioned in the examination of the prisoner, and are the parties therein referred to.

The question for the opinion of the Court is, whether the examination read was properly read in evidence ?

W. F. Channell.

The following is a copy of the part of the prisoner's examination referred to in the case.

1856. The Bankrupt Law Consolidation Act, 1849. In
SLOGGETT'S Case. the Court of Bankruptcy for the *Exeter* District, Hall of Commerce, *Plymouth*, July 9th, 1855.

In the matter of *Samuel Thomas Sloggett*, a bankrupt.
Before Mr. Commissioner *Bere*.

The said *Samuel Thomas Sloggett*, being come before the said Commissioner on the day and year above mentioned, and having made and subscribed the declaration by law required, and being examined, saith the account now produced marked with the letter "A" contains a statement of all transactions I have had with Messrs. *Growcock & Co.*, of *London*, except the first, for which I paid cash. In *August* last I had an interview with Mr. *Hughes*, their traveller, and he asked me what capital I had in my business, and I told him from about 250*l.* to 300*l.* He asked me to whom I could refer him to satisfy him; I hesitated, and told him I could not tell to whom to refer him, but said he could go to my friends, I meant my father; he took my father's address, and put it down. There was then a letter written by Messrs. *Growcock*, of which the copy produced is, as near as I recollect, the substance. The letter was sent to my father the 24th of *August*. The letter was brought to me by my younger sister, and I was asked what reply was to be made to it, and I went home to my father's on the *Sunday* following the receipt of the letter and saw my father. I asked my father to reply to it, stating he knew, as well as I did, how I was circumstanced; my father refused to reply to it, as I wished, because he said the money was not my own capital, and was borrowed; my sister was present at the interview. The reply was forwarded and written by my brother, *Richard Sloggett*, on the 26th of *August*; the letter produced marked "C" is that which he wrote; the whole is his hand

writing, including the address. The letter was written in an office belonging to my brother, and was not authorized by my father, who did not know of its being written. I did not prepare the draft of the letter; my brother *Richard* wrote it himself, merely asking me what he was to say. I told him he was to say the money was my own property. My brother knew that the money had been lent to me by Mrs. *Warburton*.

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Case.

1. *Question.* What object had you in view when you gave Messrs. *Growcock & Co.* that statement in the letter knowing it was false: was it not to obtain additional credit?

Answer. No, I had no such object.

2. *Q.* Do you adhere to that answer?

A. My object was to gain credit to a certain extent, but I was not aware that the *difference* between stating the capital was my own, and being borrowed, would affect my credit.

3. *Q.* Do you adhere to that answer?

A. Yes.

4. *Q.* Again you are asked if you adhere to that answer?

A. Yes.

5. *Q.* Why did you not then make a true statement instead of a false one?

A. I anticipated one day the sum would be mine, and I thought it was a form of theirs to obtain a reference.

6. *Q.* Why did you practice such a fraud as getting your brother to write in your father's name?

A. I was not aware it was a fraud.

7. *Q.* What has become of the letter sent by *Growcock & Co.* to your father?

1856.

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Case.

A. I do not know, I have never seen it since my brother wrote the reply to it; I believe it has been destroyed.

Q. Did you ever promise your brother *Richard* to make it right with your father if he would write it?

A. I never said so.

Q. Did you promise your brother to take it to your father for his approval?

A. I did, and I took it to my father accordingly.

Q. Did he caution you against sending it?

A. No, I believe not.

Q. Did you tell your brother that your father had refused?

A. I did, before he replied to it. He asked me the nature of it, and I told him (*a*).

This case was argued on the 26th of *April*, 1856, before JERVIS C. J., COLERIDGE J., CRESSWELL J., ERLE J. and MARTIN B.

J. D. Coleridge (with him *M. Bere*), appeared for the Crown, and *Collier* (with him *E. V. Richards*), for the prisoner.

Collier, for the prisoner. The examination before the Commissioner was a compulsory examination, and was therefore inadmissible in evidence against the prisoner. The answers of witnesses in ordinary cases at Nisi prius, and in criminal cases where they have not objected to answer, are no doubt admissible against them on a subsequent trial; but there is a material distinction between evidence so obtained and

(*a*) The learned Serjeant referred to the following authorities in the margin of the case. *Reg. v. Wheater*, 2 Moo. C. C. 45; 2 Lewin's C. C.

157. *Reg. v. Garbett*, 2 Den. C. C. 237; 2 Car. & Kir. 474. Cases collected in *Taylor on Evidence*, 2nd Edition, Vol. 1, p. 273, s. 821.

the examination of a bankrupt in the Court of Bankruptcy, in which the answers are obtained by compulsion. By sections 117 and 254 of the Bankrupt Law Consolidation Act, 12 & 13 Vict. c. 106. (a), the Court may summon the bankrupt before it and examine him "touching all matters relating to his trade dealings or estate." It is compulsory upon the bankrupt to answer all questions that may be put to him; he cannot refuse to answer, although his answer may tend to criminate him, and if he gives false answers on such examination he is subjected to the penalties of perjury.

Re Heath (b) and *Re Feaks* (c) are authorities to shew that a bankrupt was bound under the former Bankruptcy Act to disclose his property, although an

(a) Section 117 enacts, "That the Court may summon any bankrupt before it, whether such bankrupt shall have obtained his certificate or not, and in case he shall not come at the time appointed by the Court (having no lawful impediment made known to and allowed by the Court at such time), it shall be lawful for the Court, by warrant, to authorize and direct any person or persons the Court shall think fit to apprehend and arrest such bankrupt and bring him before the Court; and upon the appearance of such bankrupt, or if such bankrupt be present at any sitting of the Court, it shall be lawful for the Court to examine such bankrupt, after he shall have made and signed the declaration contained in the Schedule (W.) to this act annexed, either by word of mouth or on interrogatories in writing, touching all matters relating to his trade, dealings or estate, or which may tend to disclose any secret grant, conveyance, or con-

cealment of his lands, tenements, goods, money or debts; and to reduce his answers into writing, which examination so reduced into writing, the said bankrupt shall sign and subscribe." Section 254 enacts, "That any bankrupt or bankrupt's wife, who shall upon any examination upon affirmation, or after making and signing the declaration authorized or directed by this or any other act relating to bankrupts; and any person who shall upon any examination upon oath or affirmation, or in any affidavit or deposition, or solemn affirmation so authorized or directed; or in any affidavit or deposition, or solemn affirmation, wilfully and corruptly give false evidence; or wilfully and corruptly swear or affirm any thing which shall be false, being convicted thereof, shall be liable to the penalties of wilful and corrupt perjury."

(b) 2 Deac. & Chitt. 214.

(c) Ibid, 226.

1856.
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1856. indictment was pending against him for concealing it, and although his answer might tend to criminate him; and *Erskine* C. J., in his judgment in *Re Heath*, adopts the language of Lord *Eldon* in *Ex parte Cossens* (*a*), where his lordship says: "I conceive that there is no doubt that it is one of the most sacred principles in the law of this country that no man can be called on to criminate himself if he choose to object to it; but I have always understood that proposition to admit of a qualification with respect to the jurisdiction in bankruptcy because a bankrupt cannot refuse to discover his estate and effects, and the particulars relating to them, though in the course of giving information to his creditors or assignees of what his property consists, that information may tend to shew he has property which he has not got according to law." The examination, then, is compulsory, and whatever is compulsory is inadmissible.

In *Reg. v. Wheater* (*b*) the examination of a person taken on oath as a witness before commissioners in bankruptcy was received in evidence against him, on a charge of forgery; but then he had been expressly cautioned by the commissioner and allowed to elect what questions he would answer, and it was assumed by the Counsel for the Crown that if he had not been so cautioned the deposition would not have been admissible. Even under those circumstances the Court was not unanimous in its judgment; but this is not the case of an ordinary witness, examined before the Court of Bankruptcy, but is the case of the bankrupt who is compelled by statute to answer.

The principle laid down in *Ex parte Cossens* is recognised by Lord *Lyndhurst* in *Ex parte Kirby* (*c*).

(*a*) Buck. 540.

(*b*) 2 Moo. C. C. 45.

(*c*) 1 Mont. & Mac. 225.

The statute deprives a bankrupt of his common law right; at common law a witness may object to answer any question which he thinks will tend to his crimination, although the answer would not lead to an immediate conclusion of guilt; *Cates v. Hardacre* (a); but this statute deprives the bankrupt of that privilege, and the examination was therefore compulsory, and is inadmissible.

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ERLE J.—It would not have made any difference to the creditors whether the bankrupt told the truth or not about the letter; it was not a question relating to the bankrupt's property or estate.

CRESSWELL J.—By the statute the bankrupt must make a full discovery of his property; but the questions here asked of the bankrupt do not appear to be upon "matters relating to his trade dealings or estate."

Collier. It may be said that where the question put to a bankrupt does not touch his trade dealings or estate, he might claim the privilege of not answering as upon an ordinary trial; but a bankrupt, whilst under examination, ought not to be called upon to decide whether a question does or does not relate to his trade dealings or estate; he cannot be expected to be so conversant with law as to be able to distinguish, whilst under examination, between such questions as have, and such as have not, that relation. The whole examination is virtually compulsory.

But I also contend that this was a question relating to the matters referred to in the section, as it had reference to a sum of 300*l.*, which the bankrupt had in his trade.

I also submit whether any part of this examination could be used, as during a portion of it the bankrupt was in actual custody; the latter portion of the exa-

1856. mination being on that ground inadmissible the whole
SLOGGETT'S ought to have been rejected.
Case.

Coleridge, for the Crown. The only question is whether this was a voluntary examination, and it is submitted that it was. Witnesses in ordinary cases are bound to answer questions which are unpleasant to them, and may be committed if they refuse to answer, and in that sense all examinations may be said to be involuntary; but it cannot be contended, that where a witness gives an answer under the pressure of cross-examination, such answer is, on that ground, inadmissible in evidence against him. The only ground upon which a witness can object to his answers being used as evidence against him, is that he had the right to refuse to answer, and that he claimed his privilege and it was refused; any thing he then said would not be afterwards admissible against him.

Reg. v Garbett (a). In this respect no distinction in principle can be made between the examination of a bankrupt and an ordinary examination at Nisi Prius. In this case the bankrupt did not claim the protection of the Court, and that protection had not been refused; the examination was therefore voluntary and admissible.

In *Reg. v. Wheater* there was a criminal charge pending against the witness at the time he was under examination, and there was therefore a very good reason why the Commissioner should caution him, and the fact that such caution was given will account for the apparent qualification introduced into the report of that case.

The *obiter dicta*, even of a great Judge, may have been improvident, and that of Lord *Eldon*, in *Ex parte Cossens*, may possibly not be such as can be supported;

but looking at the *res judicata*, and the whole of the facts, that case is in favour of the Crown; and the same remarks apply to the judgment of Lord *Lyndhurst* in *Ex parte Kirby*. 1856.
SLOGGETT'S
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Collier, in reply.

JERVIS C. J.—I am of opinion that in this case the examination of the prisoner in the Court of Bankruptcy was properly received and was admissible in evidence against him. In deciding this it is unnecessary to express any opinion on the question whether the examination would have been admissible if it had been directed solely to the matters which the bankrupt is bound to answer by virtue of the Act of Parliament. I do not concur with Mr. *Collier* in the second ground, upon which he contended that the examination was compulsory and inadmissible. He contends that, admitting that the commissioner has only power compulsorily to examine the bankrupt “touching all matters relating to his trade dealings or estate,” the matters upon which the bankrupt may be questioned may be so involved that he could not be expected or required to discriminate between those which relate to his trade dealings or estate, which he is bound to disclose, and those which do not, and which, therefore, he might object to answer, and therefore that the whole examination is compulsory. That is not the test; the test is, whether he *may* object to answer. If he *may*, and he does not do so, he voluntarily submits to the examination to which he is subjected, and such examination is admissible in evidence against him. This examination was not touching any matters relating to the trade dealings or estate of the bankrupt; he might have objected to the examination, but he did not do so; the examination was therefore voluntary and admissible.

COLERIDGE J.—I am of the same opinion, and upon the same grounds.

1856. CRESSWELL J.—I am entirely of the same opinion.
SLOGGETT's Case. I will express no opinion as to what was said by Lord *Eldon* and Lord *Lyndhurst* in *Ex parte Cossens* and *Ex parte Kirby* without looking more into those cases. The rule of the common law is, that a man is not bound to criminate himself. It may be that, in certain matters, section 117 of the Bankrupt Act has deprived the subject of the privilege of refusing to answer; but supposing that to be so, and that the bankrupt is bound to answer, and can no longer claim the protection of the common law, the questions put to the bankrupt in this case did not relate to the matters within the section; and as the bankrupt did not object to answer those questions the examination was admissible.

ERLE J. and MARTIN B. concurred.

Conviction affirmed.

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TO
THE PRINCIPAL MATTERS.

ABANDONING CHILD.

If a woman wilfully abandons her infant child of too tender years to provide for itself, in order to render her indictable at common law, it is necessary to aver and prove an injury to the health of the child; and it will not be sufficient to support an averment that the health of the child had been greatly and materially injured, to shew "that the child had suffered injury, but not to any serious extent." *Reg. v. Philpott*, 179

then they went away together some distance, without the intention of returning:—*Held* that there was a taking of the girl out of the father's possession within the meaning of the statute 9 Geo. 4. c. 31. s. 20., by the prisoner when he met the girl and went away with her at the appointed place, as up to that moment she had not absolutely renounced her father's protection.

Held also that such taking need not be by force actual or constructive, and that it is immaterial whether the girl consents or not. *Reg. v. Mankletow*, 159

ABDUCTION.

A girl under the age of 16, having by persuasion been induced by the prisoner to leave her father's house and go away with him without the consent of the father, left her home alone by a pre-concerted arrangement between them and went to a place appointed where she was met by the prisoner; and

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See LARCENY (1).

ACCOMPlice.

The rule that a jury should not convict on the unsupported evidence of an accomplice is a rule

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of practice only, and not a rule of law. *Semble*, that a Judge should advise the jury to acquit, unless the testimony of the accomplice be corroborated, not only as to the circumstances of the offence, but also as to the participation in it by the accused, and that where there are several prisoners, and the accomplice is not confirmed as to all, the jury should be directed to acquit the prisoners as to whom he is not confirmed; but *held*, that this being a rule of practice only, if a jury choose to act on the unconfirmed testimony of the accomplice, the conviction cannot be quashed as bad in law.
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Where an act of Parliament upon which an indictment was framed was repealed after the indictment was found by the grand jury, but before plea pleaded:—*Held*, that the judgment must be arrested.
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BAIL.

1. The prisoners were committed by the warrant of the coroner of *S.* and also by warrant of justices of that county on a charge of wilful murder, they having on their own confession acted as seconds in a duel in which one *O.* met his death:—*Held*, that the circumstances that the duel was a fair one, and that the prisoners and other persons concerned in the duel were foreigners, ignorant of

the fact that by the law of *England* killing an adversary in a fair duel amounted to murder, formed no ground for admitting the accused to bail.

Held, also that, although the Court of Queen's Bench, as the sovereign court of criminal jurisdiction, has in all cases the power to admit to bail, yet that in its discretion where the crime is of high nature, the evidence clear, and the punishment heavy, it will not admit persons committed for such an offence to bail. *Reg. v. Barronet and Another*, 51

2. In moving for a certiorari to bring up depositions taken before a coroner or magistrates with a view to admitting a party committed upon them for trial on a charge of murder or manslaughter to bail, it is the proper course to produce copies of such depositions verified by affidavit, and on them to ground the application.

The principle upon which bail is refused or granted in cases of murder and capital offences as laid down in *Reg. v. Barronet and Another*, p. 51, confirmed. *Reg. v. Barthelemy and Another*, 60

BAIL IN ERROR.

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BANKRUPTCY.

1. On an indictment against a bankrupt under sect. 253 of the 12 & 13 Vict. c. 106, for, within three months next preceding the filing of a petition in bankruptcy, obtaining goods on credit under the false colour and pretence of deal-

ing and carrying on business in the ordinary course of trade, it is necessary for the prosecution to prove, not only the petition to and adjudication by the Court of Bankruptcy, but also the preliminary matters, viz. the petitioning creditor's debt, the trading and the act of bankruptcy. The act of bankruptcy relied upon being the filing of a petition in the Court for Relief of Insolvent Debtors, a copy of the petition, certified as required by sect. 239 of the above statute, was put in evidence, but there was no proof of the date of the filing except the indorsement at the back of the petition. *Held*, that such indorsement was no evidence of the date of the filing of the petition, and therefore no evidence of the act of bankruptcy. *Reg. v. Lands alias White*, 567

2. The defendant (one of two bankrupts and partners) was indicted under 12 & 13 Vict. c. 106. s. 251. for not surrendering. Upon the evidence it appeared, and the jury found, that the bankrupts both left this kingdom before any proceedings in bankruptcy had been taken against them, believing that they should be made bankrupts, and that they staid abroad with the intent to defraud their creditors by depriving them of their right to examine the bankrupts, and to make them responsible.

On the trial, the proceedings in bankruptcy were put in, and it appeared that there were erasures and interlineations in the affidavit verifying the petition for adjudication. *Held*, that the presumption of law was, that the affidavit was in the same state as when it was sworn; as to alter it after it was sworn would be an act of fraud and misconduct which would not be presumed.

The petition in bankruptcy was allotted by ballot to Commissioner

G., but the subsequent proceedings were either before Commissioner *H.* or Commissioner *F.* *Held*, that they were not invalid on that account.

The duplicate adjudication was, after the bankrupts had left the kingdom, left at their last usual place of business, and on the same day the property of the bankrupts was removed therefrom, and the place locked up by the messenger of the Court of Bankruptcy ; but the notice was left on the premises, and seen there two or three weeks afterwards. Subsequently the summons to surrender was left at the same place, which was unlocked for the purpose and then locked up again ; before the trial the place was searched, and neither adjudication nor notice was found ; but notice to produce them was served on the prisoner forty-eight hours before the trial. *Held*, that the duplicates of those documents were admissible in evidence.

In the adjudication, and other proceedings previously to the advertisement in the *Gazette*, the bankrupts were described as of *M. Lane* and *C. Lane*, in the city of London, colonial brokers, and of *W. Lane*, in the county of Middlesex, distillers. In the advertisement in the *Gazette* the description was the same, except that *W. Lane* was said to be in the county of Essex. *Held*, that the notice in the *Gazette* was not insufficient on this account.

The bankrupts did not surrender. The summons or notice to surrender was issued by Commissioner *H.*, the proceedings having as before stated been allotted to Commissioner *G.* *Held*, that this was no valid objection to the summons.

The notice was to appear on one of two days, the first of which had expired before the summons

was served. *Held*, that this was sufficient service, as the last of the two days was the day limited according to the statute for the surrender.

The notice was to surrender before Commissioner *G.*, but on the day limited for the surrender Commissioner *G.* did not sit, but Commissioner *F.* did. *Held*, that this formed no ground of objection, as one Commissioner could legally sit and act for another.

There was no evidence that the prisoner had actual knowledge of the adjudication and notice to surrender ; but the jury found that he went abroad with the belief before stated, and stayed abroad with the intent before stated. *Held*, that knowledge was not required by the statute, and that if the notice to surrender was duly served, this objection could not prevail.

This being a joint fiat against the prisoner and his partner, and only one duplicate adjudication and one duplicate notice to surrender having been served at the last place of business of the bankrupts : *Held*, by a majority of the Judges, that this service was insufficient ; that a separate notice to surrender ought to have been left for each of the bankrupts ; and that the conviction must therefore be quashed. *Reg. v. Gordon,* 586

3. Where a bankrupt is examined before a commissioner in bankruptcy touching a matter not relating to his trade dealings or estate, and does not refuse to answer on the ground that the answer would tend to criminate him, but answers without any objection : *Held*, that his answers were voluntary, and that his examination was admissible against him on a subsequent criminal charge. *Quære*, whether if the

examination had been confined to matters relating to his trade dealings or estate, such examination would not then have been compulsory and inadmissible. *Reg. v. Sloggett,* 656

BIGAMY.

The prisoner, a British subject resident in *England*, married in *Scotland*, according to the law of *Scotland*, a woman resident in *England*, and while she was alive married in *Scotland*, according to the law of *Scotland* another woman resident in *England*. *Held*, that he was properly convicted of bigamy in *England*, under sect. 22 of 9 Geo. 4. c. 31. *Reg. v. Toppling,* 647

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Where a Judge who reserved a case died before signing it: *Held*, that the other Judge named in the commission was virtually present at the trial, and that therefore if he signed the case, it would be a sufficient compliance with the statute. *Reg. v. Featherstone,* 369

CENTRAL CRIMINAL COURT.

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CERTIORARI.

1. The Court of Queen's Bench has the power to issue a special writ or order in the nature of a *certiorari* under 4 & 5 Wm. 4. c. 36.

- for the removal of indictments for obtaining money under false pretences from the sessions mentioned in that act to the Central Criminal Court, notwithstanding 7 & 8 Geo. 4. c. 29. s. 53. taking away certiorari in the case of indictments for obtaining money under false pretences. *Reg. v. Sill,* 10
2. The defendant was convicted of perjury on an indictment removed at his instance by *certiorari*: *Held*, that the prosecutors, who were executors of a deceased person, were entitled to costs under 5 & 6 Wm. & M. c. 11., as "persons grieved or injured," although the perjury occasioned them no actual damage, it being sufficient to bring the case within the statute that the perjury *might* have caused them damage, and the false oath of the defendant having put a difficulty in their way which they were compelled to remove. *Reg. v. Major,* 13
3. Where on the removal of an indictment from sessions by *certiorari*, a recognizance is given by sureties to answer for the appearance of the party indicted, for his pleading thereto, and at his own proper costs and charges procuring the issue joined to be tried, giving due notice to the prosecutor, and for his not departing, until discharged by the Court of Queen's Bench, such sureties are liable for the prosecutor's costs in case of the conviction of the party indicted under 5 & 6 Wm. & M. c. 11. ss. 2 and 3. *Reg. v. Hodgson,* 14
4. Where one of several defendants obtained a *certiorari* for the removal of an indictment into the Queen's Bench, and a *procedendo* was moved for on the ground that the *certiorari improvide emanavit*, inasmuch as the other defendants had not joined in the application for the writ, and had not under 5 & 6 Wm. & M. c. 11. entered into recognizances to pay the costs of the prosecutrix in case of their conviction: *Held*: that the defendant on whose application the *certiorari* was granted (being a person to whose responsibility there appeared no objection), might enter into recognizances to pay costs in case of the conviction of himself or of the other defendants, or either of them, and that under these circumstances the *procedendo* would not be ordered. *Reg. v. Probert et al.* 30
5. Where the expences of a prosecution conducted by the city solicitor at the direction of the Lord Mayor of London, were paid out of the funds of the corporation: *Held*, that the Court had no power to order the defendant to pay the costs of the prosecution incurred by the removal of the indictment by *certiorari* on his conviction, such a case not being within 5 & 6 Wm. & M. c. 11. s. 3. *Reg. v. Wilson,* 79

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See BANKRUPTCY (3).

CONCEALMENT OF BIRTH.

The prisoner, the mother of a child of which she has been recently delivered, with the intention of concealing the dead body of the child from a surgeon, placed it under a bolster on which she laid her head. It was assumed in the case that she meant to remove the body elsewhere when an opportunity occurred. *Held*, (POLLOCK C. B. *dissentiente*), that she was upon these facts properly convicted of endeavouring to conceal the birth of the child by secretly disposing of the dead body, as it is not necessary in order to constitute that offence under 9 Geo. 4. c. 31. s. 14., that the body should be put in a place which is intended to be the place of its final deposit. *Reg. v. Perry*, 471

been given into the charge of Mrs. A., a married daughter of the master, but having no control over the prisoner by reason of any relationship of master and servant. Whilst alone with Mrs. A., the prisoner being in custody, the former said to the prisoner, "I am very sorry for you; you ought to have known better; tell me the truth whether you did or no." The prisoner said, "I am innocent." Mrs. A. replied "Don't run your soul into more sin, but tell the truth." The prisoner then made a full confession. *Held*, that there was neither an authority to make any inducement, nor any inducement or threat, and that the evidence was admissible. *Reg. v. Sleeman*, 249

CONFESSiON.

See PRISONER'S STATEMENT.

1. An inducement to confess in the shape of a threat was held out to the prisoner, who was suspected of an offence, by a person having no authority, and without the nature of the charge being stated, but in the presence and hearing of a person who had authority. Subsequently the nature of the charge was stated by the same person in the same presence and hearing, and thereupon a confession was made. *Held*, that the confession was not admissible. *Reg. v. Luckhurst*, 245

2. The prisoner, a maid servant, was indicted for setting fire to a farm building of her master's. She was taken into custody by a policeman. She endeavoured to get away, but was told she was a prisoner on the charge of arson. She desired to change her dress, and was permitted to do so, having first

CONSPIRACY.

1. Where there is a general count for conspiracy the defendant is entitled to have particulars of the specific charges intended to be relied on in support of such general count, and an affidavit that the defendant does not know on what the prosecution intend to rely is not necessary. *Reg. v. Probert, et al.*, (note) 32
2. Indictment alleged that S. sold B. a mare for 39*l.*; that while the price was unpaid, B. and C. conspired by false and fraudulent representations to S. that the mare was unsound, and that B. had sold her for 27*l.*, to induce S. to accept a less sum of money in payment for the said mare than B. had agreed to pay S. for the same, and thereby to defraud S. of 12*l.* of the price. It was proved in evidence that S. had sold the mare to be as alleged, and had agreed to trust him for the price. That B. afterwards, together with C., falsely represented to S. that

the mare was unsound of her wind, and that she had been examined by a veterinary surgeon, who had pronounced her a roarer. *B.* afterwards told *S.* that in consequence of the unsoundness he had sold the mare for 27*l.* only (which was false), and persuaded *S.* to receive that sum in satisfaction of his claim, but no receipt or other discharge was given. *Held,* that, although the acceptance of the 27*l.* could not be pleaded in satisfaction of the larger sum, the indictment was sustainable, and that the facts proved in evidence did sustain it. *Reg. v. Carlisle and Brown,* 337

3. The first count of the indictment charged that the prisoners intending to defraud one *I. G.* did conspire "to cheat and defraud the said *I. G.* of a certain large sum of money, to wit 20*l.*" The second charged a conspiracy by false pretences "to obtain from *I. G.* a large sum of money, to wit 20*l.*, and to cheat and defraud him thereof." The third count charged a conspiracy by false pretences "feloniously to steal from the said *I. G.* a large sum of money, to wit 20*l.*" The fourth count charged an attempt by false pretences to obtain "from the said *I. G.* the sum of 20*l.* with intent to defraud." The fifth and last count charged that the prisoners by false pretences did attempt to steal "from the said *I. G.* a large sum of money, to wit 20*l.* of the monies of the said *I. G.*" The prisoners were found guilty and judgment was passed on each count of the indictment. The prisoners were convicted on all the counts, and were sentenced to a distinct punishment on each. *Held,* that the 5th and last was a good count, and that the conviction must therefore be affirmed.

Semble, that the first four counts were not good. *Reg. v. Bullock and Clark,* 653

CONSTABLE.

See **LAWFUL APPREHENSION.**

CORPUS DELICTI.

See **LARCENY (6).**

CORONER.

Admissibility of deposition taken before, 410

COSTS.

See **NEW TRIAL.**

CERTIORARI.

On reserved case, 291, 436

COUNSEL.

Semble that Court will assign counsel on reserved case, 433

COUNTERFEIT COIN.

1. On an indictment for uttering counterfeit coin, in order to prove a guilty knowledge, evidence may be given of a subsequent uttering by the prisoner of counterfeit coin of a different denomination to that mentioned in the indictment. The difference in the denomination of the coin goes to the weight of the evidence, but not to its admissibility. *Reg. v. Florster,* 456
2. The prisoner, with the intent to coin counterfeit half-dollars of Peru, caused to be made and procured in this country dies necessary for the purpose of making such counterfeit coin, but which would not alone produce it; but the prisoner intended to procure the rest of the necessary apparatus for the purpose and with

the intention of using the entire apparatus, when procured, in making the counterfeit coin. The jury found that the prisoner intended to make only a few of the counterfeit coins in *England*, by way of trying whether the apparatus would answer before sending it out to *Peru* to be there used in making counterfeit coin. *Held*, 1. That to make a few coins in *England* with the object stated would be to commit the offence of making counterfeit foreign coin within the statute 37 *Geo. 3.* c. 126. s. 2. 2. That the procuring the dies was an act in furtherance of the criminal purpose sufficiently proximate to the offence, and sufficiently shewing the criminal intent to support an indictment founded upon it for a misdemeanor. *Reg. v. Roberts*, 539

3. The prisoner was indicted under the 2 *Wm. 4.* c. 34. s. 8. for having in his possession counterfeit coin, knowing it to be counterfeit, and with intent to utter and put off the same. The police officer who searched the prisoner found upon him, in different pockets of his dress, four counterfeit crowns of the same date and mould, thirteen counterfeit half-crowns of the same date and mould, fourteen counterfeit shillings of the same date and mould, (each of the said counterfeit coins being wrapped in a separate piece of paper), and four shillings in good money. *Held*, that there was sufficient evidence to go to the jury that the prisoner knew the coin to be counterfeit, and that he intended to utter it. *Reg. v. Jarvis*, 552

CREDIT IN ACCOUNT.

See FALSE PRETENCES (6).

CRIMINAL INFORMATION.

See NEW TRIAL.

CROSS-EXAMINATION.

4. *B.* and *C.* were indicted for larceny, and were separately defended. At the close of the case for the prosecution the Court decided that there was no case to go to the jury against *C.*, and he was acquitted. *C.* was then called as a witness in defence of *A.*, and gave evidence tending to criminate *B.* On this *B.*'s Counsel claimed the right to cross-examine *C.*, and address the jury in reply. This the Court refused to allow, but offered to put to *C.*, through the chairman, such questions as *B.*'s Counsel might suggest. *A.* and *B.* were both convicted. *Held*, that *B.*'s Counsel had a right to cross-examine *C.* and to reply on his evidence, and that the conviction of *B.* must be reversed.

Quære, whether he would have had that right if the evidence of *C.* had not tended to criminate *B.*

Semblé, that this Court will in its discretion assign Counsel for a prisoner. *Reg. v. Burdett*, 431

CUTTING AND WOUNDING.

See LAWFUL APPREHENSION.

DESCRIPTION, MATTER OF.

See INDICTMENT (1).

DEPOSITION.

The prisoner was charged before a magistrate with feloniously wounding *A.* with intent to do him grievous bodily harm, and the deposition of *A.* was taken under 11 & 12

Vict. c. 42. s. 17. *A.* subsequently died of the wound, and the prisoner was indicted for his murder. *Held*, that on the trial of the prisoner for the murder the deposition of *A.* might be read in evidence; as, although the deposition was not taken on the same technical charge as that for which the prisoner was indicted, it was in fact the same case, and the prisoner had had full opportunity for cross-examination.

Semble, that if the charge on the two occasions had been substantially different, the deposition would not have been admissible. *Reg. v. Beeston,* 405

Admissibility of deposition taken before coroner, 410

2. The prisoners were convicted of larceny. On the trial the prosecutor not being in attendance, his deposition (which had been duly taken before the committing magistrate) was received in evidence, it appearing that he was not absent from an intention to defeat justice, but that being a foreigner, who, at the time the larceny was committed, was serving on board a foreign vessel, he had returned to his own country, and was, at the time of the trial, residing abroad. *Held*, that the deposition was inadmissible. *Reg. v. Austin and Turner,* 612

DUEL.

See *BAIL.*

EMBEZZLEMENT.

See *LARCENY* (3), (7).

1. The prisoner, who was clerk to the prosecutor, was indicted in three different counts for embezzling certain moneys belonging to his master. The evidence shewed

that the prisoner had received at different times several sums of money from the prosecutor, a dealer in skins, for the purpose of purchasing skins. The prisoner obtained the skins on credit and applied the money to his own use, but debited the prosecutor in his day cash-book with several sums of money as having been paid for the skins. The jury found the prisoner not guilty of embezzlement, but guilty of larceny. *Held*, that the conviction was wrong. *Reg. v. Goodenough,* 210

2. The prosecutor had contracted with the *Great Northern Railway Company* for finding and providing them with necessary horses and carmen for the purpose of conveying and delivering to the customers of the company the coals of the company in their own waggons, and that he or his carmen should, day by day, duly account for and deliver to the company's coal manager all moneys received in payment for coals so delivered. The delivery notes, as well as receipted invoices of the coals, were handed to the carmen of the prosecutor, and the former were taken to his office, but the invoices, receipted by the company, were left with the customers on payment of the amount. The prisoner was the servant of the prosecutor, employed as his carman in the delivery of coals pursuant to the contract, and it was his duty to pay over, direct to the clerks of the company, such moneys as he might receive for coals. The prisoner delivered coals to one of the company's customers, and brought the delivery order to the office to be entered; he received for the coals the sum of 5*l.* 10*s.*, leaving the receipted invoice with the customer, which sum he converted to his own use. He was indicted and convicted of embezzling the

moneys of the prosecutor who had contracted with the company. *Held*, that there was such privity as to make the prisoner the agent of the company in receiving the money, and that such money was not received for or on account of the prosecutor, but for or on account of the railway company.
Reg. v. Beaumont, 270

3. *G.* was the prosecutor's servant, and received over the counter for the prosecutor a piece of marked money which the prosecutor, who suspected the prisoner, had given to another to go and buy spirits of the prisoner at the prosecutor's public house. The prisoner made away with the money. *Held*, that he was guilty of embezzlement.
Reg. v. Gill, 289

4. *O.* was indicted for embezzlement, and for the purpose of proving his identity as the person receiving certain monies from *S. & Co.* for the prosecutors, an entry in a book of *S. & Co.* was read in evidence. The account was kept in four columns, in the first of which was entered the dates; in the second the name of the person on whose behalf the money was received; in the third the signature of the person receiving; and in the fourth the amount of the particular payment made by *S. & Co.* *Held*, that the entry as explained by the evidence amounted to a receipt, and that even for the purpose of proving identity the whole entry could not be read without a stamp, and that therefore the conviction was wrong. *Reg. v. Overton,* 308

5. *H.* was tried and convicted at the sessions for the county of *W.* on an indictment charging him with embezzling certain moneys as servant to the inhabitants of that county. It appeared that *H.* was

the miller of a mill in the gaol of the county, that the offence, if any, took place entirely within the gaol, which is situate within the county of the city of *W.*, more than 500 yards from the county of *W.*, and that the county of the city of *W.* has a separate jurisdiction and its own Recorder and Quarter Sessions. It was the duty of *H.* to direct persons bringing grain to be ground at the mill to obtain at the porter's lodge a ticket, specifying the quantity of grain brought. The ticket was his order for receiving the grain, and it was his duty to receive the grain with the ticket, to grind it, to receive the money for the grinding, and to account for the money to the governor of the gaol, who accounted to the county treasurer. *H.* had no right to grind any grain at the mill for his private benefit, nor without a ticket as above mentioned. *H.* was appointed to his situation by the magistrates of the county at a weekly salary, which was paid to him out of the county rates by the governor of the gaol, who received the money from the county treasurer. *H.* received and ground grain without a ticket, and without directing the persons bringing the grain to obtain one. He received the money for the grinding, and did not account for it to the governor of the gaol, but applied it to his own use. *Held*, that *H.* could not be convicted of embezzlement, as the conclusion to be drawn from the facts was, that he had made an improper use of the mill by grinding the corn for his own benefit, and consequently that he did not receive the money for or on account of his masters.
Quære, whether the Court of Quarter Sessions had jurisdiction to try the case?
Quære, whether *H.* was rightly

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charged as servant of the inhabitants of the county?

Semble, per CRESSWELL J., that after verdict this Court has no power to amend a count so as to make a jury party to the finding. *Reg. v. Harris*, 344

6. The prisoner was convicted on an indictment charging him with embezzlement in one count as servant to *A.*, and in another count as servant to *B.* *A.* and *B.* were two among other sewers of gloves residing at *C.*, the manufacturers of the gloves carrying on business at *D.* The prisoner was a carrier residing at *C.*, and was exclusively employed between the glove sewers at *C.* and the manufacturers at *D.* The sewers were not known to the manufacturers, but when a sewer wanted work the prisoner gave her name and a number to the manufacturers, and received from them unsewn gloves for her to sew. Each sewer, having her number, sent back by the prisoner the gloves when sewn with her name pinned to the parcel. These parcels the prisoner delivered to the manufacturers, and if the parcels were found correct he received the total amount due to the sewers in one sum, and fresh parcels of unsewn gloves. His duty then was to deliver to each sewer her fresh work and also the money due to her, deducting his charge. If any work was missing the manufacturers looked to the sewer if found, but if not they looked to the prisoner for it. The prisoner, according to the course above stated, took out numbers for *A.* and *B.*, and having received money for both of them from the manufacturers, denied the receipt of the money, and applied it to his own use. *Held*, that the prisoner was not a servant but merely a bailee, and was only guilty of a breach of

trust and not of embezzlement. *Reg. v. Gibbs*, 445

7. The prisoner was convicted on an indictment charging him with embezzlement. It appeared in evidence that he was store keeper and clerk at a county gaol, and that it was no part of his duty (which was defined by written instructions) to receive money; but that he had from time to time received moneys in the absence of the governor of the gaol, and to the knowledge of some of the justices. It was submitted on the part of the prisoner, that he had not received the money by virtue of his employment, and that that question ought to be left to the jury; but the Recorder directed the jury, that if they believed that the prisoner received the money, he did receive it by virtue of his employment. *Held*, that the question whether the prisoner received the money by virtue of his employment ought to have been left to the jury, and that the conviction was wrong. *Reg. v. Arman*, 575

8. The prisoner was convicted on an indictment under section 1 of the 2 Wm. 4. c. 4. The indictment alleged that the prisoner, being in the public service and entrusted by virtue of his employment with the receipt and custody of certain money, the property of the Queen, to wit, to the amount of 5000*l.*, fraudulently and feloniously applied the same to his own use and benefit, and so feloniously stole the same. By the evidence it appeared that he was an officer of Inland Revenue, and received certain taxes, in respect of which he was allowed to retain in his hands a balance of about 300*l.* to meet contingent expences, that it was his duty to render accounts to certain inspectors, and that these accounts when rendered shewed a

much larger balance in his hands than he was allowed to retain. That at last the General Surveyor of Inland Revenue examined the prisoner's accounts, and produced to him a statement extracted from them, shewing a balance in his hands of upwards of 5000*l.*, which he admitted. The Surveyor then asked him if he was prepared to pay over that balance, or any part of it, and he said he was not. The Surveyor then reminded him that there was a balance of excise duties alone of about 300*l.* standing against him from the previous *Monday*, which was a receipt day, at *T.* The prisoner then took out 255*l.* in Bank notes, a check for 25*l.* 8*s.* 4*d.*, and a money order for fourteen shillings, and said that that was all the money he had in the world. The Surveyor then asked what he had done with the rest, and he said he had spent it in an unfortunate speculation. *Held*, that there was evidence of the receipt of a particular sum of 300*l.*, and of a misapplication of a part of it; and that therefore there was sufficient to support the conviction.

Quære, whether evidence of a general deficiency on a balance of accounts would alone have supported the indictment?

Quære, whether evidence of such a general deficiency is sufficient to sustain an indictment for embezzlement under 7 & 8 Geo. 4. c. 29. s. 47.? *Reg. v. Moah*, 626

ENGRAVING PROMISSORY NOTE.

The prisoner was tried and convicted on an indictment, framed upon the stat. 11 Geo. 4 & 1 Wm. 4. c. 66. s. 18., for engraving upon a plate part of a promissory note, purporting to be part of the

note of a banking company. It was proved in evidence that the prisoner, being possessed of a promissory note of the *B. L. Banking Company*, had cut out the centre of the note on which the whole promissory note was written; and had procured to be engraved upon a plate merely the royal arms of *Scotland* and the *Britannia* (which formed part of the ornamental border), the said arms and the *Britannia* being respectively placed upon the plate in the same position as that in which they would be found in a complete note of the company.

The case stated that upon the facts submitted to the jury, the prisoner was rightly convicted, subject to the question, whether such an engraving satisfied the words of the statute, as being an engraving upon a plate of "part of a bill of exchange or promissory note purporting to be part of the bill or note."

Held, 1. That it did, as every part of what usually circulates as a note, the ornamental border as well as the obligatory words, is part of the note, "within" the meaning of the statute.

2. That in order to ascertain whether that which was engraved on the plate "purported" to be part of the note, extrinsic evidence was admissible; and that, for that purpose, the jury might compare the plate with a genuine note of the company. *Reg. v. Keith*, 486

ESTREAT.

Form of plea to estreat, and replication thereto. *Reg. v. Hodgson*, 14

EVIDENCE.

In order to establish the fact of a marriage in *Scotland* it is neces-

sary that some witness conversant with the law of *Scotland* as to marriage should be called. And where a woman present at a marriage ceremony in *Scotland*, performed at a private house by a minister of a congregation—but whether or not of the kirk she did not know—stated that she herself had been married in the same way; that parties always married in *Scotland* in private houses, and that the parties after the ceremony had lived together as man and wife:—*Held*, that her evidence was insufficient to prove the law of marriage in *Scotland* or to establish a marriage in fact.

Reg. v. Povey, 32

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FALSE PRETENCES.

1. The indictment charged that the defendant by false pretences did unlawfully obtain from *B.* two bills of exchange for the payment of 150*l.* respectively, and one bill of exchange for the payment of 250*l.* with intent to cheat and defraud him the said *B.*:—*Held*, bad on writ of error, as it did not appear who was the owner of the property so alleged to have been obtained by false pretences; the statute 14 & 15 Vict. c. 100. not altering the law as settled prior to that act, that in an indictment for obtaining money by false pretences it was as necessary to state the ownership of property as in a case of larceny.

Reg. v. Sill, 132

2. The prisoner was indicted for obtaining money under false pretences. The evidence shewed that the prisoner in *July*, 1850, called upon prosecutrix and made false representations relative to a benefit club, but failed on that occasion to obtain any money. In *August* of the same year prisoner again called relative to the club, and referred to the previous conversation. The jury returned a verdict of guilty, in effect finding that the money was obtained by reason of the false pretences made in these several conversations. *Held*, that the jury might consider the first and second conversations as one continuing representation, and that the conviction was right. *Reg. v. Welman*, 188

3. The defendant was indicted in *England* for a misdemeanor in attempting to obtain moneys from

L. & Co., by false pretences. The defendant had a circular letter of credit marked No. 41, from *D. S. & Co.* of *New York*, for 210*l.*, with authority to draw on *L. & Co.* in *London* in favour of any of the lists of correspondents of the bank in different parts of the world for all or such sums as he might require of the 210*l.* The circular letters of credit of *D. S. & Co.* were each numbered with distinctive numbers, and it was the practice of the correspondent on whom the draft was drawn, after giving cash on such draft, to indorse the amount on the circular letter, and when the whole sum was advanced the last person making such advance retained the circular letter of credit. The defendant having procured from *D. S. & Co.* of *New York* a circular letter of credit for 210*l.*, No. 41, came to *England* and drew drafts in favour of the named correspondents there in different sums, in the whole less than 210*l.*, retaining the circular letter, the sums so advanced being indorsed on the letter. He then went to *St. Petersburg* and there exhibited the letter of credit to *W. & Co.* of that place, a firm mentioned in the list of correspondents, the letter having first been altered by him by the addition of the figure 5 to 210, so converting it into a letter of credit for 5,210*l.* He obtained from that house several sums and finally a sum of 1,200*l.*, and another of 2,500*l.*, on drafts for those amounts on *L. & Co.*: *W. & Co.*, forwarded these drafts to their house in *London*, who presented the draft for 1,200*l.* on *L. & Co.* and required payment of it. *L. & Co.* having been advised of the draft No. 41 by *D. S. & Co.* as a draft for 210*l.* only, discovered the fraud and refused to pay it. The defendant being afterwards found

in *England* was taken into custody and indicted as before stated. The jury found the prisoner guilty, and in reply to a question put by the learned Baron as to whether, although the defendant's immediate object was to cheat *W. & Co.* at *St. Petersburg* by means of the forged letter of credit, he did not also mean that they or their correspondents, or the indorsees from them, should present the draft and obtain payment of it from *L. & Co.*, and the jury further found that he did. Held, that if *L. & Co.* had paid one of the drafts, the defendant could not in law have been found guilty of the statutory misdemeanor, and consequently that he could not be found guilty of attempting to commit the common law misdemeanor.
Reg. v. Garrett, 232

4. *G.*, secretary to a burial society, was indicted for falsely pretending that a death had occurred, and so obtaining from the president an order on the treasurer in the following form:—"Bolton United Burial Society, No. 23, Bolton, Sept. 1st, 1853, Mr. A. Entwistle, Treasurer. Please to pay the bearer 2*l.* 10*s.*, Greenhalgh, and charge the same to the above society. Robert Lord, Benjamin Beswick, President." Held, that this was a valuable security under the 7 & 8 Geo. 4. c. 29. s. 53., as explained by the 5th section of the same statute. *Reg. v. Greenhalgh,* 267

5. In an indictment for obtaining money under false pretences, the only pretence charged was that the defendant falsely pretended to one *T. W.* that he had received an order for payment of money from *W. M. C.* for the payment of a quarter's salary then due and owing to the defendant. It was proved that the defendant was

curate to the said *W. M. C.*, and that the defendant, after telling *T. W.* that he had received an order to go and receive his quarter's salary of *L.*, and that *L.* was very ill and could not do it for him, asked *T. W.* to let him have the money, and shewed him a paper to this effect: "Received of *L.* the sum of 25*l.* for the Rev. *W. M. C.*'s note." *T. W.* gave him 15*l.*, and the defendant gave him the following receipt: "Received from *T. W.* 15*l.* on account of Rev. *W. M. C.*'s order for 25*l.*" *T. W.* in his evidence stated, that he had no doubt the paper produced by the prisoner was genuine, and that he rested on that as much as on the other part of the transaction; that it contributed to produce confidence, and that it was in consequence of what he saw, and what the prisoner said, and what the prisoner gave him, that he was induced to let the prisoner have the money. *T. W.* also said that the defendant first told him that he had received a letter from *W. M. C.* that morning wishing him to go to *L.* and draw his quarter's salary, and that was part of the inducement to *T. W.* to let the prisoner have the money. The points left to the jury were, 1. Did the defendant make use of the pretence alleged in the indictment? 2. Did *T. W.* part with his money in consequence of his belief in that pretence? 3. Was that pretence false? 4. Did the defendant obtain the money with intent to defraud? The jury returned a verdict of guilty. *Held*, 1. That there was no variance between the pretence laid, and the pretence proved. 2. That the actual substantial pretence on which *T. W.* parted from his money was the pretence of the order. 3. That the manner in which the case was left by the Court to the jury was right. *Reg. v. Hewgill,*

6. The defendant contracted in writing with the guardians of a parish to supply and deliver for a certain term to the out-door poor, at such times as the guardians should direct, loaves of bread of three and a half pounds weight each. The guardians were, during the said term, to pay the defendant after certain rates and prices for the bread so supplied, and of which a bill of particulars should have been sent. The contract contained a proviso, that in case the defendant broke the terms of his contract in any of the ways therein named, one of which was by a deficiency in the weight stated and charged for in the bill of particulars, the guardians might employ other persons to supply the bread, and charge the defendant with the costs of such supply above the price contracted for, and might retain any moneys due to the defendant under the contract at the time of such breach towards such costs, or the damages which the board might sustain, and might also put in suit against the defendant a bond which he then executed, and which was conditioned for the due performance of his contract.

The indictment contained ten counts, the first seven of which were in substance the same, and charged the defendant with a common law misdemeanor, in supplying and delivering, as such contractor, loaves of bread to different poor persons, which loaves were deficient in weight, intending to injure and defraud such poor persons, and to deprive them of proper and sufficient food and sustenance, and to endanger their healths and constitutions, and to cheat and defraud the said guardians.

The three last counts charged the defendant with attempting to obtain money from the guardians by falsely pretending to the re-

lieving officer that he had delivered loaves of the proper weight.

It was proved in evidence, that on a poor person applying for relief the relieving officer gave the applicant a ticket, the presentation of which to the defendant entitled him to receive a loaf; that the defendant received these tickets and gave to the poor persons presenting them loaves of bread which the jury found were deficient in weight, and were so with the knowledge of the defendant.

By the course of dealing the defendant would return the tickets in the following week, with a statement in writing of the number of loaves he had supplied, and the relieving officer would credit the defendant in account with the guardians with the amount, and the money would then be paid to him at the time stipulated in the contract. The tickets were so returned by the defendant, and he was credited in account accordingly; but the fraud was discovered before the stipulated time for payment of the money had arrived. The jury found that the defendant intended to defraud the out-door poor, and that by returning the tickets to the relieving officer he intended to represent that he had delivered the loaves mentioned in them of the weights stated.

Held, 1. That the first seven counts did not disclose an indictable offence, as the delivery of loaves of less weight than that contracted for was a mere private fraud, no false weights or tokens having been used. 2. That the defendant was properly convicted on the last three counts of attempting to obtain money by false pretences, as the fraudulent representation made was of an antecedent fact; and that although the defendant had only obtained

credit in account, and could not have been convicted of obtaining money by false pretences, he was nevertheless properly convicted of the attempt, his obtaining the credit in account being the last act depending on himself towards obtaining the money.

Quare, whether a sale of goods with a false representation of the weight or quality is an indictable offence? *Reg. v. Eagleton*, 376, 515

7. The defendant was indicted for obtaining goods by false pretences. It appeared that he obtained the goods from the prosecutors by pretending that he wanted them for one *J. S.*, whom he represented as living at *N.*, and being a person to whom he would trust 1000*l.*, and who went out twice a year to *New Orleans* to take goods to his sons. The jury found that all the representations were false, and that the prosecutors, believing that the defendant was connected with the said *J. S.*, and employed by him to obtain the goods, contracted with the defendant and not with the supposed *J. S.*, and delivered the goods to the defendant for himself and not for *J. S. Held*, that the defendant was, under these circumstances, rightly convicted of the offence charged in the indictment. *Reg. v. Archer*, 449

8. In an indictment for obtaining money by false pretences, the pretence averred in some of the counts was, that the prisoner falsely pretended that he having executed certain work there was a certain sum of money "due and owing" to him for and on account of the work, being parcel of a larger sum claimed by him; whereas there was not then "due and owing" to him such money

being parcel of a larger sum. The false pretence averred in other counts was, that the prisoner falsely pretended that there was "due and owing" to him the whole amount of a sum of money for and on account of certain work executed by him; whereas there was not then "due and owing" to him the whole amount of such sum of money, but only a smaller sum. *Held*, that the indictment was bad, inasmuch as a false pretence of an existing fact was not sufficiently alleged, and the averments would be proved by evidence of a mere wrongful overcharge. *Reg. v. Oates*, 459

See CERTIORARI (1).

CONSPIRACY (2).

LARCENY (14).

MUTINY ACT.

VENUE.

FELONIOUS TRESPASS.

See LARCENY (2).

FOREIGN COIN.

See COUNTERFEIT COIN.

FORGERY.

1. The prisoner was indicted for forging an order for the payment of money. The document was in the following form: "*Holton, Mar. 31, 1853. Sirs Pleas to pay the bearis Mrs. Smart the sum of eaight Hundred and 50 4 £ ten shillings for me. James Ramsey.*" *Held* that, though this document was not addressed to any one, it might be shewn by evidence to be an order for payment of money, within the 11 Geo. 4 & 1 Wm. 4. c. 66. s. 3., and for whom it was intended. *Reg. v. Snelling*,

2. S. was indicted for uttering, with intent to procure himself to be appointed to the place of schoolmaster, a forged document, purporting to be a certificate from a clergyman that he had the charge of a large school, and that he had conducted it under that clergyman's superintendence with ability and success. *Held*, that the conviction was good at common law, and that it is an offence at common law to utter a forged instrument, the forgery of which is an offence at common law, and that the effecting of the fraud is immaterial. *Reg. v. Sharman*, 285

GAME.

The defendant was convicted, under the 1 & 2 Wm. 4. c. 32. s. 30., of trespassing on land in the possession and occupation of *G. B.* in pursuit of game. *Held*, that the entry upon the land under that section must be a personal entry; but it having been proved that the defendant was on the highway in pursuit of game and not as a traveller, and that *G. B.* was the owner of the land on both sides of the highway: *Held*, that as the soil and freehold of the highway was in *G. B.* as the owner of the adjoining land, there was a personal entry on the land by the defendant within the meaning of the statute. *Quære*, whether this decision applies to sect. 9 of the Night Poaching Act, 9 Geo. 4. c. 69. *Reg. v. Pratt*, 502

GLANDERED HORSE.

See MISDEMEANOR (1).

GUILTY KNOWLEDGE.

See COUNTERFEIT COIN (1).

HIGHWAYS.

An indictment charged that certain part of a highway was out of repair. Part of the road had, at the time when the indictment was preferred, been destroyed by the encroachments of the sea, and the surface of the existing road was in good repair up to where the same had been so destroyed, at which part the road was terminated by a perpendicular cliff caused by successive encroachments. *Held*, that there was no obligation on the parish to provide an available carriage-road down to the beach, the encroachments of the sea having destroyed the road, so that the subject of repair was not in existence. This Court will not entertain a question of costs which is not within their jurisdiction, although it is expressly agreed by a case reserved that the Court should have the same power with respect to such costs as the judge could legally have exercised at the trial. *Reg. v. Inhabitants of Hornsea*, 291

INDECENT EXPOSURE.

The prisoner was indicted for a misdemeanor at common law for an indecent exposure of his person in a public omnibus, in the presence and view of several persons. *Held*, that an omnibus is a public place sufficient to support the indictment. *Held*, also, that since the 14 & 15 Vict. c. 100., an indictment for a public nuisance need not conclude *ad commute documentum*. *Reg. v. Holmes*, 207

INDICTMENT.

1. In an indictment, under 9 Geo. 4. c. 69. s. 2., for assaulting a game-keeper of the Duke of Cambridge, the Duke was described as "George

William Frederick Charles Duke of Cambridge." It was proved on the trial that "George William" were two of his Christian names, but that he had other Christian names which were unknown to the witnesses, and were not proved. The jury found a verdict of guilty, and stated that they were satisfied with the evidence of the identity of the Duke. *Held*, 1. That the conviction was wrong, as matter of description in an indictment, though unnecessarily alleged, must be proved as laid. 2. That the Court of Quarter Sessions were not bound to amend at the trial; but that, under the 14 & 15 Vict. c. 100. s. 24., they might in their discretion have made an amendment by which the conviction would have been supported, by striking out all the Christian names. 3. That an amendment, by striking out only the two names which were not proved, would have been wrong. 4. That all amendments should be made before a case goes to the jury. 5. That it was now too late to amend. *Reg. v. Frost and Russell*, 474

2. For robbery, where evidence points to a felonious assault. See *Reg. v. Mitchel, et al.* (note) 19
3. For bringing a horse infected with glanders into a public place. *Reg. v. Henson*, 24
4. For non-payment of penalties under Alehouse Act. *Reg. v. Dale*, 37
5. For unlawfully obtaining and procuring obscene prints. *Dugdale v. Reg.* 64
6. For indecent exposure of person. *Reg. v. Holmes*, 207
7. For having in possession implements of housebreaking. *Reg. v. Bailey*, 244

8. For counterfeiting foreign coin, 540

See PREVIOUS CONVICTION.

RECEIVING (2).

INFORMATION.

- When it need be on oath. See *Reg. v. Millard*, 166

INQUISITION OF ROME.

JUDGMENT OF. See LIBEL (2).

JURY.

See VERDICT.

JUSTIFICATION.

See PLEA OF JUSTIFICATION.

LARCENY.

1. *A.* had the charge of the prosecutor's warehouse, in which bags were kept; *B.* for some years had been in the habit of supplying the prosecutor with bags, which were usually placed outside the warehouse, and shortly after so leaving them, either *B.* or his wife called and received payment for them. *A.* went into his master's warehouse and removed twenty-four bags which had been marked by his master, and placed them outside the warehouse in the place where *B.* used to deposit his bags before payment for them. Soon afterwards the wife of *B.* came, and claimed payment for the said twenty-four bags. The prosecutor then sent for *B.*, who, upon being asked respecting the bags, said that they had been placed there an hour previously by him, and demanded payment for them. The jury found that the bags had been so removed in pursuance of a previous arrangement between *A.* and *B.* Held, that *A.* was rightly con-

victed of larceny, and that *B.* was an accessory before the fact. *Reg. v. Manning and another*, 21

2. Where a man driving a flock of lambs from a field, drove with the flock a lamb belonging to another person, without knowing that he did so, and afterwards, when he discovered the fact, sold the lamb, denied having done so, and appropriated the proceeds to his own use. Held, that he was rightly convicted of larceny; for, having in the first instance driven away the lamb, the property of another, he committed a *trespass*, which, as soon as he resolved to dispose of the animal (the trespass continuing all along), became a *felonious trespass*. *Reg. v. Riley*, 149

3. The prisoner was sent by his master to the railway station for 10 cwt. of coals, which, being supplied, were placed in scales and put into the master's cart. The prisoner had been directed by his master to bring the coals to his house; but on his way home, without authority, he disposed of a quantity of the coals to a third person. Held, that the prisoner was properly convicted of larceny. *Reg. v. Reed*, 168, 257

4. It appeared that the prisoner, without the knowledge or consent of a gas company, caused to be inserted a connecting pipe, with a stop-cock upon it, into the entrance and exit pipes, and extending between them; and, the entrance pipe being charged with the company's gas, he shut the stop-cock of the meter, and so consumed the gas without its passing through the meter. Held, that the prisoner was properly convicted of larceny, and that there was a sufficient severance of the gas in the entrance pipe to constitute an *asportavit*. *Reg. v. White*, 203

5. *W.* was indicted for larceny for stealing 6 lbs. of brass from a foundry. The only suggested evidence offered at the trial was that the prisoner, who was employed upon the premises, had been seen to come into the place where the brass was kept. *Held*, that there was not a *scintilla* of evidence to go to the jury. *Reg. v. Walker and Morrod*, 280
6. *B.* was indicted for larceny. It was proved that he was seen coming out of the lower room of a warehouse in the *London Docks*, in the floor above which a large quantity of pepper was deposited, and where he had no business to be. He was stopped by a constable who suspected him from the bulky state of his pockets, who said, "I think there is something wrong about you," upon which *B.* said, "I hope you will not be hard with me," and then threw a quantity of pepper out of his pocket on the ground. The witness stated he could not say that any pepper had been stolen nor that any pepper had been missed, but that found upon *B.* was of a like description with the pepper in the warehouse. *Held*, that the prisoner upon these facts was properly convicted of larceny. *Reg. v. Burton*, 282
7. *G.* was indicted for larceny. The evidence shewed that he was the prosecutor's servant; that it was his duty to receive and pay moneys for the prosecutor and make entries of such receipts and payments in a book which was examined by the prosecutor from time to time; that the prisoner on one occasion shewed a balance in his favour of 2*l.* by taking credit for payments falsely entered in the book as having been made by him, when, in fact, they had not been made by him, and that the prisoner received from his master the sum of 2*l.* as a balance due to him. Prisoner was convicted. *Held*, that the conviction was wrong. *Reg. v. Green*, 323
8. *W.* was indicted for stealing a piece of paper which the evidence proved was a written agreement, but unstamped, to build certain cottages, and it was proved that work was still going on under the agreement at the time it was taken. *Held* (*Parke, B., dissentiente*), that this being a chose in action was not the subject of larceny. *Reg. v. Watts*, 326
9. The prisoner assigned his goods by deed to trustees for the benefit of his creditors. No manual possession was taken under the assignment, but the prisoner remained in possession of the goods himself, and while in such possession he removed the goods, intending to deprive the creditors of them. The jury found the prisoner guilty of larceny, and found that the goods were not in the custody of the prisoner as the agent of the trustees. *Held*, that the conviction was wrong. *Reg. v. Pratt*, 360
10. The prisoner was charged with stealing twenty-two sovereigns and some wearing apparel. The prosecutor's wife took from the prosecutor's bed room thirty-five sovereigns and some articles of clothing, and left the house, saying to the prisoner, who was in a lower room, "It's all right, come on!" The prisoner and the prosecutor's wife were afterwards seen together, and were traced to a public house, where they slept together. When taken into custody, the prisoner had twenty-two sovereigns on him. The jury found the prisoner guilty on the ground that he received the sovereigns from the wife knowing that she

took them without the authority of her husband. *Held*, that the conviction was right. *Reg. v. Featherstone,* 369

11. The prisoners were charged with stealing four sacks of barley and three sack bags from their master. It was proved in evidence that the prisoners and one *B.* were employed by the prosecutor to winnow barley which he had mixed with canary seed. One of the prisoners fetched several sacks from the prosecutor's house, which he and *B.* filled with barley. The two prisoners then sent *B.* home before the usual time. At twelve o'clock on the night of the same day, the carter went into the stable with a lantern, and shortly afterwards the two prisoners entered the stable. In a few minutes after this the prosecutor saw the carter in the loft above with a lantern, and found the two prisoners concealed under straw in the loft, and then in a dust bin in a stable beneath he found three sacks full of barley, mixed with canary seed, which he swore was of the same kind which he had mixed. It was no part of the duty of the prisoners to place the barley in sacks, or to put the sacks of barley into the dust bin. The jury found both the prisoners guilty. *Held*, that the evidence was sufficient to support the conviction. *Reg. v. Samways and Willis,* 371

12. The prisoners were charged with stealing certain moneys of *Jane Jones*. It appeared that the prisoners, by false representations, induced the prosecutrix to purchase a dress for 25s., promising that if she would do so, they would give her another dress worth 12s. They then took a guinea out of her hand, (she neither consenting nor resisting, but being taken by surprise), and gave her a dress

worth much less than a guinea, but refused to give her the dress which they had promised. The jury, upon these facts, found the prisoners guilty. *Held*, that the facts warranted the finding, as the Court was bound to assume that the jury were properly directed, and that they found that it was part of the scheme of the prisoners to obtain the money by means of a pretended sale, *Reg. v. Morgan and Mackeowan,* 395

13. The prisoner was indicted for stealing a purse and its contents. A purchaser at the prisoner's stall left his purse on it. The prisoner's attention was called to the purse by another person, and she treated it as her own and put it in her pocket, and afterwards concealed it. The prosecutor returned to the stall and asked the prisoner about the purse, but she denied all knowledge of it. The jury found that the prisoner took up the purse, knowing it was not her own, and intending to appropriate it to her own use; but that she did not know who was the owner of the purse at the time she so took it. On this finding a verdict of guilty was recorded. *Held*, that the conviction was right inasmuch as the property was not lost property, but property mislaid under circumstances which would enable the owner to know where to find it, and that, therefore, it was unnecessary to inquire whether the prisoner, when she took the purse, reasonably believed that the owner could not be found. *Reg. v. West,* 402

14. A quantity of wheat was in the possession of the prosecutors as bailees, and was deposited in one of their storehouses, under the care of one of their servants, who had authority to deliver it only on the order of the prosecutors or

- their managing clerk. The prisoner, who was also a servant of the prosecutors, by a false statement, induced the servant, under whose care the wheat was, to allow him to remove part of the wheat, which he carried away and appropriated to his own use. *Held*, that under these circumstances the prisoner was properly convicted of larceny. *Reg. v. Robins*, 418
15. The prisoner was convicted of larceny under the following circumstances. The prisoner was a common carrier and was employed by the prosecutor to carry a cargo of coals from a ship to a coal yard, and thence to another yard belonging to the prosecutor. The prisoner carted the coals to the first mentioned coal yard, and was engaged for several days in carting them from thence to the prosecutor's other yard. He left the first mentioned coal yard on one of those days with two carts and a waggon all laden with coals; before he arrived at the other yard he delivered the two cart loads to a third person on his own account; but he duly delivered the waggon load at the prosecutor's other yard. *Held*, that the conviction was wrong, the coals having been delivered to the prisoner as a carrier, and there having been no breaking of bulk or other determination of the bailment. *Reg. v. Cornish*, 425
16. The prisoner was convicted of stealing certificates of a foreign railway company, which certificates it was proved in evidence were treated and dealt with on the London Stock Exchange as scrip of a foreign railway. *Held*, that such certificates are a valuable security within the statute 7 & 8 Geo. 4. c. 29. s. 5., and that the conviction was right. *Reg. v. Hugh Joseph Smith*, 561
17. The prisoner was convicted upon an indictment for stealing a purse containing seven 5*l.* notes and other money. It was found by the jury that the purse and its contents were lost by the prosecutor and found by the prisoner. There was no evidence that the notes had any name or other mark upon them indicating to whom they belonged, nor was there evidence of any other circumstances which would disclose to the prisoner, at the time when he found the property, the means of discovering the owner; but the jury being asked whether, at or after the time of finding the purse and its contents, the prisoner believed that there was a reasonable probability that the owner could be found, answered that he did believe that the owner could be traced. *Held*, that the prisoner was not properly convicted. *Reg. v. Dixon and Lee*, 580
18. The prisoner was convicted of larceny. It appeared by the evidence that the prosecutor, in the hearing of the prisoner, told his servant that he must go to S. and pay him money, upon which the prisoner offered to take it, falsely stating that he lived only six doors from S. This statement induced the prosecutor to deliver the money to the prisoner to carry to S.; but the prisoner, instead of carrying the money to S., converted it to his own use. The jury, on finding their verdict of guilty, stated that their verdict was grounded on the belief that the prisoner had obtained the money by a trick, intending at the time to appropriate it to his own use. *Held*, that the conviction was right. *Reg. v. Brown*, 616
19. The prisoners were convicted of stealing a Post Office order. It appeared by the evidence that a post letter, containing a Post

Office order, directed to *J. D.*, was misdelivered to *J. D.*, one of the prisoners who could not read, and he took it to *W. D.*, the other prisoner, who read it for him. Upon hearing it read *J. D.* said that the letter and order were not for him; but *W. D.* advised him to keep them and get the money, and both the prisoners accordingly applied at the Post Office and obtained the money and appropriated it to their own use. *Held*, that the conviction was wrong.

Reg. v. Davies, 640

See EMBEZZLEMENT (1), (3).

STEALING FROM THE PERSON.

POST OFFICE.

VENUE.

LAWFUL APPREHENSION.

W. was indicted for cutting and wounding *T. C.* The 1st count charged the cutting with intent to disable. The 2nd with intent to do grievous bodily harm. The 3rd with intent to prevent the lawful apprehension of the prisoner. The evidence shewed that *T. C.* was a serjeant in the Lancashire constabulary force, and the prisoner a police constable under him. On *C.* going to the prisoner's house to see that he was in the discharge of his duty, an altercation took place, and *C.* left the house, when the prisoner followed and struck him. *C.* went for assistance, and returned with two police constables. The prisoner was from home, and in two hours they returned and told the prisoner to go with them to the station. The prisoner refused, and on *C.* attempting to take hold of him, the prisoner struck him upon the head with a clock weight, in-

flicting the wounds charged in the indictment. On this evidence the jury found the prisoner guilty upon the 3rd count, and negatived the intents charged in the 1st and 2nd counts of the indictment. *Held*, that the apprehension was not lawful, and therefore the conviction could not be sustained.

Reg. v. Walker, 358

LIBEL.

1. Evidence that the identical charges conveyed in a libel, had before the time of composing and publishing the libel appeared in another publication, which was brought to the prosecutor's knowledge, but against the publisher of which he took no legal proceedings, is not admissible under a plea of justification under statute 6 & 7 Vict. c. 96. s. 6.
2. A document under the seal of the *Court of the Holy Office or Inquisition of Rome*, but apparently drawn up by the notary whose name is attached to it, from a record in that Court, but which was not set forth in the document, is not evidence to prove the grounds of a judgment pronounced by that Court, the *ratio decidendi* not being stated, although it is admissible in support of an allegation in a plea of justification that such a judgment has been pronounced.
3. Where a plea of justification under statute 6 & 7 Vict. c. 96. s. 6. contains several charges, and the defendant fails to prove *any* of the matters alleged in such justification, the jury must of necessity find a verdict for the Crown, *i. e.* that the defendant has not proved the whole plea.
4. Under the statute 6 & 7 Vict. c. 96. s. 6. the Court is bound to

consider whether the guilt of the defendant convicted by a jury is aggravated or mitigated by the plea and the evidence to prove or disprove the same, and to form its own conclusion upon the whole case.

5. Affidavits explaining the defendant's reasons for having placed certain allegations injurious to the prosecutor in his plea of justification, in support of which no evidence was given at the trial are receivable in mitigation of punishment; but not as proving the truth of the charges made in them.

6. But where a document purporting to have been an official record of the conviction of the prosecutor before a foreign police court was annexed to an affidavit, for the purpose of shewing the *bona fides* of an allegation in the plea of justification: *Held* inadmissible as its admission would, in effect, put the prosecutor on his trial without his being able to make defence.
Reg. v. Newman, 85

See NEW TRIAL (2).

LOST PROPERTY.

Difference between property lost and property mislaid, 402

LUNATIC.

The prisoner was tried and convicted on an indictment under 16 & 17 Vict. c. 96. s. 9. charging that he, having the care and charge of his wife, a lunatic, did abuse and ill-treat her; and also containing a count for a common assault. *Held*, that the prisoner was not a person having the care or charge of a lunatic within the meaning of the statute, inasmuch as its provisions were not intended to apply to persons whose care or charge

arises from natural duty; and that so much of the conviction as related to the counts under the statute must be quashed. *Reg. v. Rundle,* 482

MALICIOUS TRESPASS.

1. Section 24 of the statute 8 Geo. 4. c. 30. gives a magistrate jurisdiction to convict summarily in cases of malicious damage to property. Section 30 enacts, that when any one shall be charged on the oath of a credible witness before any justice with such offence, such justice may summon the party, and if he do not appear, may determine the case *Ex parte*, or issue his warrant to apprehend the party, or, without summons, may issue his warrant, and the justice before whom the party charged shall appear or be brought, shall hear and determine the case: *Held*, that section 30 did not control the effect of section 24, and that it was not necessary that there should be an information on oath to give the magistrate jurisdiction to hear the case when the party charged appeared before him. *Reg. v. Millard,* 166

2. The prisoners were indicted under sect. 19 of the 7 & 8 Geo. 4. c. 30. (the Malicious Trespass Act), for having feloniously, unlawfully, and maliciously done damage to certain trees in a hedge, thereby doing injury to the owners to an amount exceeding 5*l.* The evidence shewed that the actual injury done to the trees was to the amount of 1*l.* only, but that it would be necessary to stub up the old hedge and replace it, the expense of which would be 4*l.* 14*s.* Upon this evidence the jury found the prisoners guilty. *Held*, that the conviction was wrong, inasmuch as the injury exceeding 5*l.* must be actual injury to the trees,

&c. and that proof of *consequential* injury was insufficient. *Reg. v. Whiteman,* 353

MANSLAUGHTER.

See BAIL.

MARRIAGE.

Proof of, in *Scotland*, 32

MARRIED WOMAN.

See RECEIVING (1).

MASTER EXTRAORDINARY.

See PERJURY.

MISDEMEANOR.

1. To bring a horse infected with the glanders into a public place, to the danger of infecting the Queen's subjects, is a misdemeanor at common law; and *Held*, that an indictment which stated that the defendant knew that a mare which he brought into a fair was slandered, was, after verdict, good without an averment that the defendant knew that the glanders was a disease communicable to man. *Reg. v. Henson,* 24

2. The defendant was indicted for a misdemeanor in having contemptuously and unlawfully neglected and refused to pay over to the treasurer of the county of *N.* one moiety of a fine imposed under the Alehouse Act, 9 *Geo. 4.* c. 61., by certain justices of the borough of *T.*, a place which has a commission of the peace, but no grant of separate Quarter Sessions within 5 & 6 *Wm. 4.* c. 76., and was found guilty. *Held*, that the defendant

was properly convicted, as penalties under the Alehouse Act, imposed by the justices of a borough so circumstanced, are payable to the treasurer of the county, and not to the treasurer of the borough on account of the borough fund. *Reg. v. Dale,* 37

3. Certain counts in an indictment charged the defendant with *preserving and keeping in his possession obscene prints*, with the intent and for the purpose of unlawfully uttering and selling the same, and thereby corrupting the morals of the liege subjects of the Queen. *Held*, upon writ of error insufficient in law.

But *Held*, that the counts in the indictment charging that the defendant did *unlawfully obtain and procure obscene prints* with a like intent, and for a similar purpose, were good and charged a misdemeanor punishable at common law. *Dugdale v. Reg.* 64

MISJOINDER OF COUNTS.

See ROBBERY (2).

MITIGATION.

See PUNISHMENT.

MURDER.

See BAIL.

MUTINY ACT.

The prisoner, a volunteer in a militia regiment, assembled for the purpose of being exercised, and therefore subject to the Mutiny Act, when taken to be attested before a deputy-lieutenant, in answer to questions contained in the form

of attestation for militia volunteers issued by the War Office, said that he did not belong to nor had been enrolled in any other corps of militia, and that he did not belong to nor had served in her Majesty's army; whereas in truth he had previously been enrolled in another corps of militia. He was then sworn and received the bounty money. *Held*, that he could not be convicted upon an indictment framed under section 57 of the Mutiny Act, 18 & 19 Vict. c. 11., as the forms in the schedule to that Act contained no such question as had been put to the prisoner respecting his previous enrolment in the militia; and as his negative answer to the question whether he had served in the army could not be considered wilfully false. *Reg. v. Jussup*, 619

on the ground of *surprise*, as in civil cases.

Where a new trial on an indictment removed into the Queen's Bench by certiorari at the instance of the defendant, is ordered on the ground of surprise, the Court may, in its discretion, order the costs to await the event of the new trial. *Reg. v. Whitehouse and Tench*, 1

2. Where a defendant means to move for a new trial in the case of a criminal information, the motion must be made, or an intimation that the defendant intends to move, given to the Court during the first four days of Term; and it will be too late, when the defendant is brought up for judgment. *Reg. v. Newman*, 85

NIGHT POACHING.

See GAME.

NOTICE TO PRODUCE.

The prisoner was indicted for arson in setting fire to his own house, with intent to defraud an insurance office. Notice to produce the policy was given the day before the trial. The policy was not produced. *Held*, that secondary evidence of the policy was not admissible. *Reg. v. Kitson*, 187

NUISANCE.

Since the 14 & 15 Vict. c. 100. s. 25. an indictment for a public nuisance need not conclude *ad communem nocumentum*. *Reg. v. Holmes*, 207

NEW TRIAL.

1. A new trial will be granted on an indictment for a misdemeanor

OATH.

Power to administer in Court of Admiralty, 251

OBSCENE PRINTS.

See MISDEMEANOR (3).

ORDER FOR PAYMENT OF MONEY.

See FORGEERY (1).

PARTICULARS OF CHARGE.

See CONSPIRACY (1).

PENALTY.

See MISDEMEANOR (2).

PERJURY.

A Master Extraordinary in Chancery has no authority to administer an oath in a suit in the Court of Admiralty. *Reg. v. Stone,*
251

See MALICIOUS TRESPASS (1).

PERSON.

See STEALING FROM THE PERSON.

PLEA OF JUSTIFICATION.

See LIBEL.

Form of plea of justification in libel,
89

POLICEMAN.

See LAWFUL APPREHENSION.

POSSESSION OF IMPLEMENTS OF HOUSEBREAKING.

The prisoner was indicted under 14 & 15 Vict. c. 19. s. 1. with having in his possession, without lawful excuse, certain implements of housebreaking, &c. The jury found the prisoner guilty. *Held*, that it was not necessary to allege in an indictment under

this section the words "with intent to commit a felony." *Reg. v. Bailey,* 244

POST OFFICE.

1. The prisoner, a letter carrier from *C.* to *T.* on the day in question, brought the sealed bag containing the letters from *C.*, and delivered it safely at the post office of *T.* to the postmaster, whose duty it was to sort the letters in time to make up the bags for the mails. The prisoner's duty was complete when he delivered the bags to the postmaster of *T.*, but after the performance of his duty he was requested by the postmaster of *T.* to assist in the sorting, which he consented to do, and whilst so engaged contrived to steal one of the letters containing a shilling. The prisoner was indicted for stealing a post letter containing money. *Held*, that the prisoner was employed under the post office in sorting the letters within the meaning of 7 Wm. 4 & 1 Vict. c. 36. s. 26. *Reg. v. Reason*, 226

2. The prisoner was convicted on an indictment charging him in one count (under sect. 26 of 7 Wm. 4 & 1 Vict. c. 36.) with stealing a *post letter* containing money, and in another count with a simple larceny of the money.

It appeared that suspicion being entertained against the prisoner who was a sub-sorter in the employ of the General Post Office, the Post Office authorities made up a letter and inclosed in it a sovereign and two shillings, and put on the letter the usual postage stamp. The ordinary course of posting a letter at the outer hall of the General Post Office is by placing it in the receiving box; but this letter an inspector de-

livered in at the window in the outer hall to another inspector, who handed it to a third, who, after locking it up for the night, handed it to a sorter, who placed it amongst the letters which it was the prisoner's duty to sort. The prisoner stole the letter and the money. *Held*, that the prisoner was not rightly convicted of stealing a post letter containing money; and that the verdict must be confined to the count for simple larceny. *Reg. v. Shepherd*, 606

See LARCENY (19).

PREVIOUS CONVICTION.

C. was charged with others in the first count of an indictment with larceny from the person. The indictment contained two other counts, each charging a previous conviction against *C.* *Held*, that any number of previous convictions may be alleged in the same indictment, and, if necessary, proved against the prisoner.

Semble, that the prosecutor might be put to elect upon which conviction he would go. *Reg. v. Clark*, 198

PRISONER'S STATEMENT.

Section 18 of 11 & 12 Vict. c. 42., which requires a caution to be given to the prisoner by the Justice before whom he is examined applies only to the concluding examination before the committing magistrate, when all the witnesses have been examined, and therefore a voluntary statement made by a prisoner, in the course of an examination before a magistrate, and before all the witnesses have been examined is admissible in evidence at the trial although no caution has been previously given. *Reg. v. Stripp*, 648

PROCEDENDO.

See CERTIORARI (4).

PROPERTY.

See MALICIOUS TRESPASS.

PUNISHMENT.

What is evidence in aggravation and mitigation of punishment in libel. See LIBEL (4) (5) (6).

RAPE.

The prisoner had carnal knowledge of a married woman under circumstances which induced her to suppose he was her husband. The jury found that when he entered the bed of the prosecutrix he intended to have connection with her fraudulently, but not by force; and if detected, to desist. *Held*, that the prisoner could not be convicted of a rape. *Reg. v. Clarke*, 397

RECEIVING.

1. The prisoner, a married woman, was convicted on an indictment for receiving stolen goods. The evidence shewed that the property had been stolen from his employer by the prisoner's husband, who afterwards took it home and gave it to the prisoner. *Held*, that the conviction was wrong. *Reg. v. Brooks*, 184

2. A count for receiving stolen goods the property of *A. B.*, alleged that the prisoner received the same, the said *A. B.* well knowing them to have been stolen. The error was discovered after verdict, and the prisoner's counsel moved in arrest of judgment, on

which the Court amended the count by striking out *A. B.* and inserting the name of the prisoner.

Held, 1. That the count, as it stood before amendment, was bad, in not alleging the *scienter*. 2. That the objection was properly taken. 3. That the Court had no power to amend after verdict. It was ordered that the record be restored to its original state, and a verdict of not guilty entered. *Reg. v. Larkin*, 365

3. *A.* was indicted for feloniously receiving a watch and a hat. It was proved that a policeman, in consequence of information received from *B.* (the thief), went to a room in a lodging house where the prisoner slept, and in a box in that room found the hat. The prisoner admitted that the hat had been brought there by *B.*, but denied all knowledge of the watch. On the following day *A.* was taken into custody, and he then told the policeman that he knew where the watch was, but did not like to say anything about it before the people of the house. *A.* then took the policeman to a place where he said the watch was, but it was not found there, but he afterwards sent a boy for the watch, and on the boy bringing the watch to the prisoner he gave it to the policeman. *Held*, that there was sufficient evidence to go to the jury. *Reg. v. Hobson*, 400

4. The prisoner was convicted of feloniously receiving stolen goods under the following circumstances. The goods were found by the owner in the pockets of the thief. The owner sent for a policeman who took the goods, but subsequently returned them to the thief, who was sent by the owner to sell them where he had sold others. The thief then went to the shop of the prisoner and sold the goods,

and gave the money to the owner. *Held*, that the conviction was wrong.

Semble, that the Court of Criminal Appeal having no taxing officer, the costs of proceedings in that Court must be taxed in the Court below. *Reg. v. Dolan*, 436

5. The prisoner was indicted for receiving a watch, knowing it to have been stolen. It appeared in evidence that the prosecutor, whilst in company at night with a prostitute at a public-house, where the prisoner and one *H.* and several other persons were, had the watch in question taken from his person, and charged the prisoner with stealing it; but upon a partial search by a policeman, it was not found. The prosecutor and the girl soon after went to a room in another house, which room was rented by her of the prisoner. After they had been there together about an hour the prisoner came to them, and asked the prosecutor if he had not lost his watch and what he would give to have it back? The prosecutor said, "I would give a sovereign." The prisoner then said, that if the prosecutor would let the girl go with him he would get it back. The prisoner and the girl then went to a room in a house where the prisoner lived, in which room *H.* was. There was a table in the room, and, although there was no watch on the table when they entered the room, a watch was a few minutes afterwards seen on the table, which one of the witnesses said, must have been placed there by *H.* The prisoner told the girl to take the watch and get the sovereign. She took it to her room to the prosecutor, and in a few minutes the prisoner and *H.* came to that room, and *H.* asked for the reward. The prosecutor gave *H.* half-a-crown;

the prisoner and *H.* left without the prisoner saying anything or receiving anything. Before the trial *H.* absconded. The Recorder told the jury that, if they believed that when the prisoner went to the girl's room and spoke about the return of the watch, and took the girl with him to the house where the watch was given up, he knew that the watch was stolen ; and, if they believed that the watch was then, with the cognizance of the prisoner, in the custody of a person over whom the prisoner had absolute control, so that it would be forthcoming if the prisoner ordered it, there was evidence to justify a conviction. The jury found a verdict of guilty, and in answer to the Recorder, stated their belief that though the watch was in the hand or pocket of *H.*, it was in the absolute control of the prisoner.

Held, 1. That the direction to the jury was right.

2. That the conviction was right, and that there was ample evidence to support it.

3. That manual possession or touch is unnecessary in order to sustain such a conviction ; but it is sufficient if there is a control by the receiver over the goods.

4. That a person having a joint possession with the thief may be convicted as a receiver.

5. That a conviction for receiving is good, although a conviction for stealing would have been supported by the same evidence if the jury had so found. *Reg. v. Thomas Smith,* 494

RECOGNIZANCE.

See CERTIORARI.

WRIT OF ERROR.

Form of plea to estreat and replication thereto. *Reg. v. Hodgson,* 14

REPEALED STATUTE.

See ARREST OF JUDGMENT.

REPLY.

See CROSS-EXAMINATION.

ROBBERY.

1. It would seem, having regard both to the common law and the statute 14 & 15 Vict. c. 100. s. 11., that the correct mode of drawing an indictment for robbery, where the evidence points to a conviction for a felonious assault, is to insert an averment for an assault with intent to rob, though its omission would be held to be cured by the act of Parliament. *Reg. v. Mitchell et al.* (note) 19

2. The prisoner was indicted in one count for feloniously assaulting the prosecutor with intent to steal the moneys and goods of the prosecutor ; and in the second count for the misdemeanor of attempting to steal the same moneys and goods. The prisoner was found guilty on the first count, whereupon his counsel moved in arrest of judgment, on the ground that the indictment was bad, by reason of a misjoinder of counts. *Held,* that the objection was unfounded, and that the prisoner was properly convicted. *Reg. v. Ferguson,* 427

SECONDARY EVIDENCE.

See NOTICE TO PRODUCE.

STATUTE.

See THE TABLE OF STATUTES.

REPEALED STATUTE.

STEALING FROM THE PERSON.

The prisoner was indicted for stealing from the person. It appeared that the prosecutor carried his watch in his waistcoat pocket fastened to a chain, which was passed through a button-hole of the waistcoat and kept there by a watch key at the other end of the chain, so turned as to prevent the chain from slipping out. The prisoner took the watch out of the pocket and forcibly drew the chain and key out of the button-hole; but the point of the key caught upon a button, and the prisoner's hand being seized the watch remained there suspended. *Held*, that the prisoner was properly convicted of stealing the watch and chain from the person of the prosecutor. *Reg. v. Simpson*, 421

SHOOTING WITH INTENT TO MURDER.

The prisoner was convicted on an indictment under 7 & 8 Wm. 4 & 1 Vict. c. 85. s. 3. charging him with wounding *A.* with intent to murder him. The prisoner supposing *A.* to be *B.*, shot at and wounded *A.* The jury found that the prisoner intended to murder *B.*, and that he intended to murder the individual he shot at supposing him to be *B.* *Held*, that the conviction was right. *Reg. v. Henry Smith*, 559

TRESPASS.

See LARCENY (2).

UNSTAMPED DOCUMENTS.

Unstamped receipt, 308
See now 17 & 18 Vict. c. 88. s. 27.

UTTERING.

See COUNTERFEIT COIN.

VALUABLE SECURITY.

See FALSE PRETENCES (4).
LARCENY (16).

VOLUNTARY STATEMENT.

See PRISONER'S STATEMENT.

VENUE.

1. The 13th section of the statute 7 Geo. 4. c. 64., is not confined in its operation to the carriages of common carriers or to public conveyances; but if property is stolen from any carriage employed in any journey, the offender may, by virtue of that section, be tried in any county through any part whereof such carriage shall have passed in the course of the journey during which such offence shall have been committed. *Reg. v. Sharpe and others*, 415

2. The prisoner was convicted of obtaining money by false pretences, the venue being laid in the county of the borough of *C.* It was proved that the prisoner by means of a false pretence contained in a letter written by him in the county of *C.*, received there the money obtained by it, which money was sent to him by the prosecutor in a registered letter. The letter containing the false pretence was received by the prosecutor in the county of the borough of *C.*, and the registered letter containing the money was posted in the county of the borough of *C.* *Held*, that the venue was properly laid. *Reg. v. Leech*, 642

VERDICT.

On the trial of an indictment for larceny, one of the jurors delivered a verdict of *Not Guilty*, which was entered in the minutes of the clerk of the peace, according to the usual practice. The prisoner was discharged out of the dock. Immediately he was discharged, and before the jury had left the box, others of the jury interfered, and said the verdict was, *Guilty*. The prisoner was brought back to the dock, and the jury was again asked what their verdict was. They all answered, *Guilty*, and the jurymen who delivered the first verdict said that he had said *Guilty*. The Chairman, hereupon ordered a verdict of *Guilty* to be recorded. *Held*, that the verdict of *Guilty* was rightly recorded. *Reg. v. Vodden*, 229

WITNESS.

The witnesses against a prisoner charged with larceny were, previously to their examination before the grand jury, sworn in open Court by the crier of the Court. *Held*, that they were properly sworn. *Reg. v. Tew*, 429

Cross-examination of witness, 431

Questions tending to criminate, 656

WRIT OF ERROR.

Form of memorial for writ of error. *Dugdale v. Reg.*, 78

1. Upon a writ of error upon a conviction of misdemeanor, the 8 & 9 Vict. c. 68. is not complied with by a recognizance, the condition of which is that the defendant, in case of affirmance of the judgment, shall surrender himself personally to be dealt with as the Court of Exchequer Chamber may order, and the Court will order fresh process to issue for the apprehension and recommitment of the plaintiff in error in a criminal case where he has been discharged from prison without a proper recognizance having been duly filed and certified. *Dugdale v. Reg.*, 254

2. Where a writ of error is sued out upon a judgment of the Court of Queen's Bench in a criminal prosecution, for the purpose of enabling the parties to effect a compromise of such prosecution, that Court has the power under the 12 & 13 Vict. c. 109. s. 39. to set aside such writ of error, and will exercise that power; and after the writ of error has been so set aside by a Court of competent jurisdiction, the Court of Exchequer Chamber will set aside a judgment, signed thereon by order of a judge, for want of a joinder in error. *Reg. v. Alleyne and others*, 505

THE END.

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